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A TREATISE

ON THE

Interstate Commerce Act

AND

Digest of Decisions Construing the Same

BY

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Of the Philadelphia Bar.

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VOLUME I

(Reports loaned by the Biddle Memorial Law Library have been used in the preparation of this work.)

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PREFACE.

The Commerce Clause has probably been the subject of more litigation of importance in the Federal Courts, than any other provision of the Constitution. It is not within the scope of this book to discuss the many decisions defining the power of Congress over Interstate Commerce, nor to take up all the litigation in connection with the various statutes passed by Congress in the exercise of this power. The present work is restricted to the particular Act of Congress known as the Interstate Commerce Act, and its various Amendments. This legislation constitutes, as it were, a subject standing by itself and the aim of the author has been to include every decision, both of those of the Courts and those of the Interstate Commerce Commission, which has involved a construction of these Statutes.

The Act is printed at the beginning of Volume I in its amended form. The foot-notes, however, show in detail every change made in the original Act of 1887 by each of the various Amendments down to the present time, making it possible to determine at a glance, on reading a given decision, exactly what form the law was in when the decision was rendered.

In discussing the various questions arising under this Act, it has been found entirely impracticable to follow the Sections of the Act. The subject has been divided into two parts—The Substantive Requirements of the Act, and The Enforcement of the Act. Part I. deals with the provisions requiring reasonable charges, prohibiting unjust discriminations and undue preferences and pooling of freights, and requiring publication of charges and adherence to tariff rates, and the allowance of switch connections. The decisions on the Commodities Clause and on the Carmack Amendment also form the subject of two chapters.

Part II. deals with the powers and duties of the Interstate Commerce Commission in connection with this Act, and with the various civil, penal and criminal proceedings in the Courts available for its enforcement.

Volume II. consists,—in addition to the table of cases and the text of the various Amendments,—of a Digest of all the decisions

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by the Commission or by the Federal Courts involving a construction of this legislation. By reason of the fact that many of the cases, especially the decisions by the Commission, contain a number of distinct propositions of law, it has been found impossible to group the decisions in the Digest according to subjects, without useless repetition. They have therefore been arranged chronologically, each having a case number. Whenever a decision is cited in the text in Volume I., this case number is given, so that the reader may at once turn to the Digest and find a summary of the facts of the case and of all the legal conclusions reached by the tribunal deciding it. The case numbers are also given in the Table of Cases at the end of Volume II., thus making it easy to find any case in the Digest provided the name of one of the parties be known. Where a case has been litigated in more than one tribunal, in addition to the case number, a letter is given, and all the litigation is grouped together. Whenever a case is cited, therefore, with a letter added after the case number, the reader is apprised that the decision is only a part of the litigation, and by turning to the Digest will find a complete summary of the previous and subsequent disposition of the case.

In citing cases in the text, there is given, in addition to the page where the case begins, the page on which the particular question for which the case is cited is discussed by the Court or the Commission. Citations are also given from the C. C. A., Sup. Ct., L. Ed. and L. R. A. reports and from the National Reporter System in addition to the regular Federal, United States, and State citations. Decisions by the Commission are cited both as reported in the Interstate Commerce Commission Reports and in the Interstate Commerce Reports. All cases are included through 211 U. S., p. 500, 165 Fed. p. 384, and through the 14th Volume of the I. C. C. Reports. This includes all decisions published prior to January 15th, 1909.

Appendix A to Volume I. contains the Rules of Practice and Forms prescribed by the Commission, and Appendix B consists of Annotations to the Commission's Reports, showing each instance in which any of the decisions by the Commission has been cited by it in a later case.

The author desires to express his great indebtedness to Francis I. Gowen, Esq., for many valuable suggestions as to the form and substance of this work and for his continued interest and assist-

ance in its preparation. He also takes this opportunity to acknowledge his obligation to Walter C. Harris, Esq., to Wm. M. Kitzmiller, Esq., and to Mr. Edward Hopkinson, Jr., for their help in reading proof and verifying authorities.

H. S. D., Jr.

Philadelphia, February 15th, 1909.

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THE INTERSTATE COMMERCE ACT

AS AMENDED.

(Approved February 4, 1887, and in effect April 5, 1887, (24 Statutes at Large, 379; 1 Supp. to Rev. Stat. U. S. 529); amended by act approved March 2, 1889, (25 Statutes at Large, 855; 1 Supp. to Rev. Stat. U. S., 684), and by act approved February 10, 1891, (26 Statutes at Large, 743; 1 Supp. to Rev. Stat. U. S., 891), and by act approved February 8, 1895, (28 Statutes at Large, 643, 2 Supp. to Rev. Stat. U. S., 369), and by an act approved June 29, 1906, (34 Statutes at Large, 584), and by act approved April 13, 1908, (35 Statutes at Large, 60).

An Act to regulate commerce.

Section 1.

Par. 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: Section 1. That the provisions of this Act shall apply to any [1] corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad [2] (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or

Parties and transportation subject to the Act.

(1) The words "any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to", were inserted by the Amendment of 1906. Until the passage of this Amendment, this portion of the paragraph read as follows: "That the provisions of this Act shall apply to any common carrier or carriers engaged * * *."

(2) The parenthesis was inserted by the Amendment of 1906. Prior to that Amendment, this portion of the paragraph was punctuated as follows: " * * * wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one state * * *."

Section 1.

Par. 1.

Parties and transportation subject.

Territory of the United States, or the District of Columbia, or [3] from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,*

Not applicable to transportation wholly within one State.

That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property [4] wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

Par. 2.

Express and sleeping car companies included.

Definition of the term "railroad."

The [5] term "common carrier," as used in this Act, shall include express companies and sleeping car companies. The term "railroad," [6] as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and [7] shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of

(3) The phrase "or from one place in a Territory to another place in the same Territory," was inserted by the Amendment of 1906.

(4) In the Act of 1887, there was a comma after the word "property" and also one after the phrase "wholly within one State." This punctuation was omitted by the Amendment of 1906.

(5) The first sentence in this paragraph was inserted by the Amendment of 1906.

(6) The commas before and after the phrase "as used in this Act" were inserted by the Amendment of 1906.

(7) The clause "and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property;" was inserted by the Amendment of 1906.

Section 1.

Par. 2.

the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and [8] the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

What the term "transportation" includes.

Duty to furnish transportation and through routes and rates.

Par. 3.

All [9] charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Charges must be just and reasonable.

Par. 4.

No [10] common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to min-

Free passes and transportation prohibited.

Exceptions.

(8) The remainder of this paragraph under the Act as it stood prior to the Amendment of 1906 read as follows: "And the term 'transportation' shall include all instruments of shipment or carriage." The remainder of this paragraph as given above was inserted by the Amendment of 1906.

(9) Prior to the Amendment of 1906, this paragraph read as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

The Amendment of 1906 expunged the phrase "or for the receiving, delivering, storage, or handling of such property," and inserted the words "or any part thereof" after the word "service."

(10) This entire paragraph was inserted by the Amendment of 1906.

Section 1.

Par. 4.

Exceptions to prohibition of free passes.

isters of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *Provided* [11] *further,* That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those

Interchange of passes.

Free carriage in time of epidemic, etc.

Definition of the term "employees."

Definition of the term "families."

(11) This further proviso was inserted by the Amendment of April 13, 1908. This Amendment also inserted the comma after the word "destitute" in the 11th line of the paragraph and also after the words "customs inspectors" (four lines above the first proviso), and expunged a comma after the word "transportation" in the next to last sentence in the paragraph. In the Amendment of 1906 the words Railway Mail Service were begun with capital letters.

Section 1.

Par. 4.

persons named in this proviso, also the families of persons killed while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

Penalty for violation of the provision.

Jurisdiction.

Par. 5.

From [12] and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Commodities clause.

Par. 6.

Any [13] common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the

Duty to construct, maintain and operate switch connections.

(12) This entire paragraph was inserted by the Amendment of 1906.

(13) This entire paragraph was inserted by the Amendment of 1906.

Section 1.
Par. 6.
Procedure before the Commission to secure switch connections.

best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Section 2.
Unjust discrimination in transportation charges forbidden.

Section 2. That [14] if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3.
Par. 1.
Undue preference of persons or localities forbidden.

Section 3. That [15] it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular

(14) Section 2 remains as adopted in 1887.

(15) Section 3 remains as adopted in 1887.

description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 3.

Par. 2.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Facilities for the interchange of traffic.

Discriminations in charges between connecting lines forbidden.

Proviso.

Section 4.

Section 4. That [16] it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Long and short haul clause.

Commission authorized to relieve carriers from this provision.

Section 5.

Section 5. That [17] it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such

Pooling of freights and division of earnings forbidden.

(16) Section 4 remains as adopted in 1887.

(17) Section 5 remains as adopted in 1887.

Section 5.
Pooling.

railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Section 6.
Par. 1.
Filing, printing and posting of schedules of rates.

Section 6. That [18] every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line,

(18) This paragraph as originally enacted read as follows:

"Sec. 6. That every common carrier subject to the provisions of this act, shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of the ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected."

It was amended by the Act of 1889 to read as follows:

"Sec. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

The Amendment of 1906 reduced the paragraph to its present form.

It will be noticed that the Act of 1887 provided merely that the schedules should "be *kept* in every depot * * *." The Act of 1889 changed this requirement making it necessary that they "shall be *posted* in two public and conspicuous places in every depot, etc." The Act of 1906 required that they "shall be *kept posted* in two public and conspicuous places, etc."

Section 6.

Par. 1.

Filing and publication of tariffs.

or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Contents of tariffs.

Posting schedules.

Par. 2.

Schedules of rates through a foreign country.

Any [19] common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print [20] and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a

(19) This paragraph is substantially as enacted in 1887.

(20) In the original Act, the following phrase read as follows: "Print and keep for public inspection, at every depot where such freight is received, etc." It was reduced to its present form by the Amendment of 1889.

Section 6.

Par. 2.

Effect of failure to post rates through foreign countries.

foreign country into the United States [21] the through rate on which shall not have been made public,[22] as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.[23]

Par. 3.

Thirty days' notice of change in rates required.

No [24] change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into

(21) The original Act contained a comma at this point, which was expunged by the Amendment of 1906.

(22) The comma at this point was inserted by Amendment of 1906.

(23) The Act of 1906 expunged the following clause from the end of the paragraph: "and any law in conflict with this section is hereby repealed."

(24) This paragraph was altered both by the Amendment of 1889, and by that of 1906. The original provision was as follows:

"No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection."

It was amended in 1889 to read as follows:

"No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given."

Section 6.

effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

Par. 3.

Notice of changes in rates.

Commission may modify requirements as to publishing, posting and filing tariffs.

Par. 4.

The [25] names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same,

Parties to joint tariffs to be specified.

(25) The remainder of the section was materially altered both by the Amendment of 1889 and by that of 1906. The provisions as they stood after the Amendment of 1889 are given below, the italicized passages having been introduced by that Amendment. The Amendment of 1889 also expunged the passage in the second paragraph below, enclosed in parenthesis. In the line of the second paragraph, above the beginning of the parenthesis, the word "carriers" was altered by the Act of 1889 to "carrier." In the last paragraph, also, the Amendment of 1889 inserted a comma after the word "situated" in the 6th line of the paragraph, and expunged one after the word "corporation," in the 7th line.

"And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

"Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which

Section 6.

Par. 4.

Concurrence in joint tariffs.

shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published (;but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges thus made and published).

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

"If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and *the* failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and

Section 6.

Par. 5.

Copies of contracts, etc., with other carriers as to traffic affected by the Act must be filed with the Commission.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

Par. 6.

Commission may prescribe form of posting tariffs.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

Par. 7.

Transportation prohibited, except at rates duly filed.

Departure from tariff rates prohibited.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided,* That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

"Carrier" means "common carrier."

Par. 8.

Preference of troops, etc., in time of war required.

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act."

Section 7.

Interruption of continuous carriage, to evade the Act, unlawful and declared ineffective.

Section 7. That[26] it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Section 8.

Liability for damages for violation of the Act.

Section 8. That[27] in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9.

Persons damaged may elect to complain to the Commission or to bring suit in Federal Court.

Section 9. That[28] any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the

(26) This section remains as enacted in 1887.

(27) This provision remains as enacted in 1887.

(28) This provision remains as enacted in 1887.

two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 9.

Actions for damages.

Officers, etc., of defendant carrier may be compelled to testify in such actions.

Section 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided,*[29] That if the offense for which any person shall be

Section 10.

Par. 1.

Penalties for violating the Act.

(29) Section 10 beginning at the word "provided" was inserted in the Act by the Amendment of 1889. This Amendment also inserted a comma after the word "person" in the 4th line of the 1st paragraph of the section.

The Elkins Act, as passed in 1903, abolished imprisonment as part of the penalty for violating the Act, wherever prescribed. The effect of this provision would be to nullify the proviso at the end of the paragraph one of section 10. The Amendment of 1906, however, restored the provision to its present form.

Section 10.

Par. 1.

Discrimination punishable by imprisonment.

convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Par. 2.

Penalties for false billing, etc., by carriers, their officers or agents.

Any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Par. 3.

Penalties for false billing, etc., by shippers and other persons.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for

each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

Section 10.

Par. 3.

False billing by shippers.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Par. 4.

Penalties for inducing carrier unjustly to discriminate.

Joint liability of agents and carriers in such cases.

Section 11. That [30] a commission is hereby created and established to be known as the Inter-state Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the

Section 11.

Interstate Commerce Commission. Appointment and terms of office.

(30) Section 11 remains as originally enacted.
See also Section 24 as added by the Amendment of 1906.

Section 11.

Appointment and terms of office of the Commission.

unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Section 12.

Par. 1.

Power of Commission to inquire into business of carriers.

Section 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and [31] the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the di-

Duty of district attorney to prosecute at Commission's instigation.

(31) The clause "and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney-General of the United States, all necessary proceedings for the enforcement of the provisions of this act; and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States;" was added by the Amendment of 1889. Commas before and after the phrase "under the direction of the Attorney-General of the United States" and after the word "act" in the phrase immediately following were expunged by the Amendment of 1891. This Amendment also changed the punctuation after the word "thereof" in the clause above quoted to a comma, reducing the paragraph to its present form.

Section 12.

Par. 1.

rection of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by [32] subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Prosecutions at instigation of the Commission.

Expenses of prosecutions.

Power of Commission to compel attendance of witnesses.

Par. 2.

Such [33] attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And [34] in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Commission may invoke aid of Federal Court to compel witnesses to attend and testify, etc.

Par. 3.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The [35] claim that any such testimony or evidence may tend to

Penalty for disobeying order of court.

Incrimination will not excuse failure to testify.

(32) The words "by subpœna" were inserted by the Amendment of 1889.

(33) This sentence was inserted by the Amendment of 1891.

(34) As originally enacted, this provision read as follows: "* * * to any matter under investigation, and to that end may invoke * * *."

The Act of 1889 substituted the words "and in case of disobedience to a subpœna, the Commission, or any party to a proceeding before the Commission," for the words "and to that end."

The Amendment of 1891 altered the provision to its present form.

(35) See also Immunity Act, infra p. 51.

Section 12.

Par. 3. Incrimination.

criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Par. 4. Depositions.

The [36] testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Notice.

Par. 5. Examination by deposition.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

Par. 6. Depositions in foreign countries.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may

(36) The remainder of this section was inserted by the Amendment of 1891.

Section 12.

Par. 6.

be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Depositions. To be promptly filed with the Commission.

Par. 7.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Fees to witnesses and magistrates.

Section 13.

Par. 1.

Section 13. That[37] any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Complaints to the Commission. Who may make.

Form.

Service.

Investigation.

Par. 2.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

Complaints by State Railroad Commissions.

Investigation by the Commission of its own motion.

Par. 3.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Direct damage to complainant not necessary.

(37) This section remains as originally enacted.

Section 14.

Par. 1.

Reports of the Commission.

Section 14. That[38] whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Par. 2.

Reports to be entered of record and copies furnished complainant and carrier.

All[39] reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Par. 3.

Publication of reports.

The[40] Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Section 15.

Par. 1.

Commission empowered to prescribe, on complaint, maximum rates and reasonable regulations effecting rates.

Section 15. That[41] the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by

(38) This paragraph as originally enacted was as follows:

"Sec. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

It was altered to its present form by the Amendment of 1906.

(39) This paragraph remains as originally enacted.

(40) This paragraph was added by the Amendment of 1889. It was unaltered by the Amendment of 1906 except for the fact that commas were expunged after the word "contained" in the 6th line of the paragraph, and after the word "States" in the 6th and 7th lines.

(41) Section 15 as originally enacted was as follows:

Section 15.

Par. 1.

any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same

Power of Commission to prescribe maximum rates and regulations affecting rates.

Orders of the Commission effective in not less than 30 days unless suspended.

Sec. 15. "That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this Act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

It was altered to its present form by the Amendment of 1906.

Section 15.

Par. 1.

Commission empowered to determine divisions of joint rates among connecting lines.

shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Par. 2.

Commission empowered to establish through routes and joint rates.

The Commission may also, after hearing of a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

Par. 3.

Commission empowered to determine maximum allowances to shippers for transportation services.

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

Par. 4.

Enumeration of powers above not exclusive.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

Section 16.

Par 1.

Award of damages by the Commission.

Section 16. That[42] if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(42) The Amendment of 1906 made radical changes in this section. Prior to this Amendment, the Act had remained unaltered since the Amendment of 1889. Under the latter Amendment, Section 16 provided as follows:

Sec. 16. "That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey *or perform* any lawful order or requirement of the Commission *created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or* for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing *the findings of fact in* the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order

Section 16.

Par. 2.

Method of bringing suit in Federal Court to collect damages awarded.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order

directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be

Section 16.

Par. 2.

of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided,* That claims accrued prior to the passage of this Act may be presented within one year.

Findings and order of Commission.

Prima facie evidence.

Attorney's fee.

Limitation of actions.

Proviso.

the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial of the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session."

The passages in italics above were inserted by the Amendment of 1889. The phrase "created by this Act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or" was substituted by the Amendment of 1889 for the phrase "in this Act named, it shall be the duty of the Commission, and lawful" in the original Act of 1887. The Act of 1889 also altered the punctuation in this section in minor respects as follows: It expunged commas after the word "apply" in line 7, after the word "servants" in line 14, after the word "prosecute" in line 19, and after the word "complaining" in line 43, and inserted commas after the word "violate" in line 2, "injunction" in line 35, "money" in line 39, "day" in line 40, "order" in line 40, and "court" in line 43.

Section 16.

Par. 3.

Joint plaintiffs and defendants in damage cases.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Service of process.

Par. 4.

Service of order of Commission.

Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

Par. 5.

Commission may suspend or modify its orders.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Par. 6.

Duty of carriers to comply with orders.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Par. 7.

Forfeiture for knowing failure to comply with orders made under Section 15.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Par. 8.

Recovery of such forfeiture.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its

Section 16.

principal operating office, or in any district through which the road of the carrier runs.

Par. 9.

Duty of district attorneys to prosecute for recovery of forfeitures.

Costs.

Special counsel.

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

Par. 10.

Enforcement of orders other than for the payment of money.

Form and service of petition.

Issuance of injunctions.

If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

Par. 11.

Appeals to Supreme Court.

From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in

Section 16.

Par. 11.

Appeals.

hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

Par. 12.

Venue of suits to enjoin, set aside, annul, or suspend Commission's orders.

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided,* That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory

Expediting acts to apply to such cases.

Also to proceeding to enforce the Commission's orders or provisions of the Act.

No suspension, etc., of Commission's order except on hearing after 5 days' notice to the Commission.

Appeals.

Section 16.

Par. 12.

Appeals from decree suspending Commission's orders.

order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further,* That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

Par. 13.

Tariffs and agreements of carriers to be preserved and admitted in evidence as public records.

The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.

Section 16a.

Rehearings by the Commission.

Section 16a. That [43] after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the

(43) Section 16a was inserted by the Amendment of 1906.

Section 16a.

Rehearings by the Commission.

consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Section 17.

Procedure before the Commission.

Section 17. That[44] the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

Section 18.

Par. 1.

Salaries, etc., of the Commissioners.

Section 18. That[45] each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of

(44) Section 17 remains as passed in the original Act except the last three words "and sign subpœnas" which were added by the Amendment of 1889.

(45) Section 18 remains in the same form as after the Amendment of 1889, the latter Amendment having made certain changes therein. As passed in 1887, the Section provided as follows:

Sec. 18. "That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper

Section 18. Par. 1. Salaries, etc., of the Commission.

the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Par. 2. Expenses.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

Section 19. Office and Sessions of the Commission.

Section 19. That [46] the principal office of the Commission shall be in the city of Washington, where its general session shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to

performance of its duties, subject to the approval of the Secretary of the Interior.

"The Commission shall be furnished by the Secretary of the Interior with suitable offices and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

"All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the chairman of the Commission and the Secretary of the Interior."

See also Section 24 as introduced by the Amendment of 1906.

(46) Section 19 remains as originally enacted.

Section 19. the business of any common carrier subject to the provisions of this act.

Section 20. Par. 1.

Commission authorized to require annual reports from carriers.

Section 20. That[47] the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information.

Contents thereof.

Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regu-

(47) All of Section 20 except the first paragraph was added to the original Act of 1887 by the Amendment of 1906. This Amendment also altered the first paragraph of the Section in certain respects as follows: Beginning at the third line of the paragraph, it substituted the words "and from the owners of all railroads engaged in interstate commerce as defined in this Act to," for the words "tc fix the time and". It inserted the phrase "the accidents to passengers, employees, and other persons, and the causes thereof;" it substituted the words "affecting the same" in the last sentence of the paragraph, for the words "with other common carriers," expunged the word "said" before "Commission" in the 7th line from the end of the paragraph and also a parenthesis after the word "prescribed" in the fourth line from the bottom of the paragraph, which in the original Act read as follows: "(if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts)."

In the original Act there was a hyphen between the words "balance-sheet" in the 11th line from the end of the paragraph and the word "in" in the 7th line from the bottom read "within."

Section 20.

lations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Par. 1.

Contents of reports.

Commission may require uniform accounts.

Par. 2.

Time of filing reports.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

Forfeiture for failure to make reports.

Commission may require monthly reports.

Par. 3.

Recovery of forfeitures.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

Par. 4.

Oath to annual reports.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

Par. 5.

Commission may prescribe form of accounts.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by carriers subject to the provisions of this Act,

Section 20.

Par. 5.

Power to prescribe form of accounts. Commission to have access to all records.

including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

Par. 6.

Forfeiture for failure to keep accounts.

In case of a failure or refusal on the part of any such carrier, receiver, or trustee, to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Par. 7.

Penalty for false accounts.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not

less than one year nor more than three years, or both such fine and imprisonment.

Section 20. Par. 7.

False accounts.

Par. 8.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

Penalty for unauthorized divulgence of information by special examiner.

Par. 9.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

Circuit and district courts may issue mandamus to compel compliance with the Act.

Par 10.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

Employment of special agents by the Commission.

Par. 11.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

Initial carrier liable for damage to holder of bill lading in spite of contract to the contrary.

Proviso.

Par. 12.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be en-

Recourse by initial carrier to carrier responsible.

Section 20.
Par. 12.
Recourse by initial carrier.

titled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

Section 21.
Annual reports by the Commission to Congress.

Section 21. That [48] the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

Section 22.
Persons and property which may be carried at reduced rates.

Section 22. That [49] nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal

(48) Section 21 was reduced to its present form by the Amendment of 1889. As originally enacted it read as follows:

Sec. 21. "That the Commission shall, on or before the first day of December in each year, make a report to the Secretary of the Interior, which shall be by him transmitted to Congress, and copies of which shall be distributed as are the other reports issued from the Interior Department. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary."

(49) Section 22 was altered both by the Amendment of 1889 and by that of 1895. As amended in 1889, the provision read as follows:

"Sec. 22. That nothing in this act shall *prevent* the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, *or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation,* or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, *or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes,*

Section 22.

governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided,* That no pending litigation shall in any way be affected by this act: *Provided further,* That nothing in this act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to

Passes and reduced rates.

Mileage excursion, and commutation passenger tickets.

Passes to railroad officers and employees.

Joint interchangeable 5000 mile tickets.

Amount of free baggage.

including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided,* That no pending litigation shall in any way be affected by this act."

The word "prevent," printed in italics, was substituted by the Amendment of 1889 for the words "apply to" in the original Act. The other italicized passages were inserted by the Amendment of 1889. The Amendment of 1895 added to the Section the provisions following the words *"Provided further."*

Section 22.

5000 mile ticket rates must be filed.

the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six

Publication of such.

relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, and charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

Adherence to published rates required.

Penalty.

Section 23.

Jurisdiction of courts to issue mandamus to compel the movement of interstate traffic or the allowance of facilities in discrimination cases.

Section 23. That[50] the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from

(50) Section 23 and Section 24 of the original Act were as follows:

Sec. 23. "That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June thirtieth, Anno Domini eighteen hundred and eighty-eight, and the intervening time anterior thereto."

Sec. 24. "That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the Commission herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage."

Section 23.
Mandamus.

having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; *Provided,* That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question in fact: *Provided,* That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

Proviso.

Writ cumulative.

Section 24.
Number and salaries of Commissioners increased.

Section 24. That [51] the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to

(51) Section 24 was added by the Amendment of 1906.

Section 24. Commission.

fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

Section 9. (Hepburn Act.) Witnesses and testimony.

That [52] all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

Section 10. (Hepburn Act.) Conflicting laws repealed. Proviso.

That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Section 11. (Hepburn Act.) When act effective.

That this Act shall take effect and be in force from and after its passage.[53]

(52) In the three following Sections, the words "this Act" refer only to the Hepburn Act.

(53) The Joint Resolution of June 30, 1906, provided as follows:

"That the Act entitled 'An Act to Amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

THE ELKINS ACT

AS AMENDED.

An Act to further regulate commerce with foreign nations and among the States.

[Approved February 19, 1903, (32 Statutes at Large, 847); amended by Act approved June 29, 1906, (34 Statutes at Large, 584).]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Section 1.

Par. 1.

Section 1. That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof,[1] which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act,[1] shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons,[1] except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts,[1] or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of [2] not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give,[1] or to solicit, accept, or receive any rebate, concession, or discrimination in respect to [3] the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof [4] whereby any such property shall by any device whatever

Carrier corporation liable to conviction as well as its officers, agents, etc.

Wilful failure to file and observe tariffs, a misdemeanor.

Penalty.

Discriminations and concessions from tariff charges forbidden.

(1) The Amendment of 1906 inserted the comma at this point.

(2) The word "of" was inserted by the Amendment of 1906.

(3) The Amendment of 1906 altered the word "of" to "to."

(4) The Amendment of 1906 altered the word "thereto" to "thereof."

Elkins Act.
Section 1.
Par. 1.

be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof,[4] or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether [5] carrier or shipper, who shall, knowingly,[6] offer grant, or give,[7] or solicit, accept,[7] or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided,*[8] That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed,[7] or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Penalty for knowing allowance or acceptance of discriminations and concessions from tariff charges.

Imprisonment for natural persons.

Jurisdiction of courts.

(4) The Amendment of 1906 altered the word "thereto" to "thereof."

(5) The Amendment of 1906 inserted the phrase, "whether carrier or shipper."

(6) The Amendment of 1906 inserted the word "knowingly."

(7) The Amendment of 1906 inserted the comma at this point.

(8) The Amendment of 1906 substituted the passage beginning "provided," as far as the end of the sentence, for the following passage contained in the original Act: "In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished."

Elkins Act.
Section 1.
Par. 2.

In construing and enforcing the provisions of this section,[7] the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or[9] shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or[9] shipper as well as that of the person.

Act of agent that of the Corporation.

Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof,[10] or participates in any rates so filed or published, that rate as against such carrier, its officers[11] or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Rates filed, published or participated in conclusively deemed the legal rates, against the carrier.

Par. 3.

Any[12] person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is author-

Additional forfeiture for acceptance of rebate.

Attorney General to collect such forfeiture.

(9) The words ", or shipper," were inserted by the Amendment of 1906.

(10) The Amendment of 1906 substituted the word "thereof" for "thereto."

(11) The original Elkins Act contained a comma after this word.

(12) The following paragraph was inserted by the Amendment of 1906.

Elkins Act.

Section 1.

Par. 1.

Collection of forfeitures.

ized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Limitation of actions.

Section 2.

All persons interested in matters before the Commission and courts, may be made parties.

Section 2. That [13] in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Section 3.

Proceedings to restrain and enjoin discriminations and departure from tariff rates.

Section 3. That [14] whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and

(13) This Section of the Act remains as originally enacted.

(14) This Section of the Act remains as originally enacted.

determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding:

Proceedings to restrain discriminations and departure from published rates.

Duty of district attorneys to prosecute such proceedings.

Such proceedings do not preclude action for damages.

Compulsory attendance of witnesses, testimony and production of books and papers.

Immunity.

Elkins Act.

Section 3.

Expediting Act of Feb. 11, 1903, applicable to cases prosecuted by the Attorney General in the name of the Commission.

Provided, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

Section 4.

Conflicting laws repealed.

Section 4. That [15] all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

Section 5.

Act effective from passage.

Section 5. That this Act shall take effect from its passage.

EXPEDITING ACT.

An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted.

[Approved, February 11, 1903, (32 Statutes at Large, 823).]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved

(15) This Section was not directly amended by the Amendment of 1906. See, however, Section 10 of the Hepburn Act, *supra.*

Expediting Act. Section 1.

July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

Section 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided,* That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

TESTIMONY ACT.

An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and amendments thereto.

[Approved February 11, 1893, (27 Statutes at Large 443; 2 Supp. to Rev. Stat. U. S. 80.).]

No person, excused from testifying, etc., before the Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one of more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

But shall not be prosecuted or punished on account of matters concerning which he may testify.

Punishment for refusal to testify or produce books and papers.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

IMMUNITY ACT.

An Act Defining the right of immunity of witnesses under the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, and an Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and an Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three.

[Approved June 30, 1906, (34 Statutes at Large, 798).]

Immunity under Acts of 1893 and 1903.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

PART I.

The Substantive Requirements of the Act.

CHAPTER I.

INTRODUCTORY.

1. The Old Law, the Mischief, and the Remedy.
2. Early Railroad Problems—Construction More Important than Operation.
3. Completion of Construction Period.
4. Abuses at Close of Construction Period — Discriminations Between Rival Shippers and Preferences Among Competing Localities.
5. Attitude of Carriers and their Officers Resulting from Lax Laws Intended to Stimulate Construction — Charging What the Traffic Will Bear.
6. Acquisition by Railroad Officials of Interests in Enterprises Along Their Lines.
7. Alteration of the Public Attitude—Appointment of the Cullom Committee.
8. The Cullom Report.
9. The Carrier at Common Law.
10. Reasons for more Stringent Legislation Against Carriers in Modern Times.
11. Common Law Principles Embodied in the Act—Reasonable Rates—Equal Rates and Facilities.
12. Defects in the Common Law.
13. The Cullom Act and Changes in the Common Law Effected Thereby.
14. Defects in the Cullom Act.
15. Amendments of 1889, 1891, 1893, 1895 and February 11th, 1903.
16. The Elkins Act.
17. The Hepburn Act.
18. Present Defects in the Law.

1. The Old Law, the Mischief, and the Remedy.

The Interstate Commerce Act, like all other legislation, must be read in the light of the period in which it was passed. As a preliminary step, therefore, to the examination of its provisions and of the judicial decisions construing them, it is necessary to make a brief survey of the growth of the principal transportation problems in this country and of the abuses connected with them; to note to what extent the common law or state legislation provided a remedy for these abuses; and to point out briefly wherein these provisions were defective.

2. Early Railroad Problems—Construction More Important than Operation.

The construction of the railroads in the United States was typically American. As soon as it was generally recognized how excellent a highway the railroad afforded, the problem was how to get the most possible railroads built in the shortest possible time. Great inducements were held out to encourage railroad building. The laws with reference to their construction and operation were made very broad. The promoter of railways was looked upon as a public benefactor and under an imperative popular demand general laws were enacted in many States enabling projectors of roads to organize at pleasure and to select their own lines.[1] After the construction was completed the directors were also permitted to operate practically as they saw fit, and with almost the same freedom as in an ordinary private business. The builders of a new road assumed great risks, and when their venture proved successful, having conferred a very great benefit on the public, they were properly entitled to charge, if they saw fit to do so, such rates as would net them a handsome return.

If the early legislation in this country had been somewhat more conservative, if thorough legislative investigation had been a necessary prerequisite to construction, if careful governmental supervision had attended the operation of our first railroads, most of the modern evils of railroad management would doubtless have been avoided, but private enterprise would have been so far discouraged as to have made the remarkable era of railroad construction from 1850 to 1885 entirely impossible. Capitalists would not have put their money into the building of railroads if their operation had been governed by the detailed regulations now in force. In 1840, the question was how to get railroads, not how to control them.

3. Completion of Construction Period.

As a result of this attitude on the part of the community, the railroad growth in this country was most remarkable. At first every new road was a boon to everyone. In comparison with the old wagon rates almost any rate was reasonable.[2] Competition

(1) See 1st Ann. Rep. 1 I. C. C. Rep. 260.

(2) The wagon rate from Philadelphia to Pittsburg prior to the construction of the railroads, was $125 per ton.

See McMaster's History of the United States, Vol. III, p. 463.

among shippers had not yet developed so as to present temptations to favoritism. About 1880, however, in many parts of the country the roads already constructed were sufficient to serve the public, and when, notwithstanding this, they were paralleled by new lines built without due consideration or for speculative purposes merely, a wholesale cutting of rates often resulted which forced one or both of the competing roads into bankruptcy. The early 80's hence show numerous receiverships, the result of improvident construction and of rate wars between parallel lines.[3]

4. Abuses at Close of Construction Period—Discriminations Between Rival Shippers and Preferences Among Competing Localities.

By this time also, merchants were doing business on very much smaller margins than in earlier days. The competition between different roads was such as to make it well worth while for a traffic manager to allow a large shipper a secret concession of a few cents per 100 pounds in order to take his traffic from a rival line, while these few cents were so important to the shipper as to enable him to drive his rivals out of business. The stronger a favored shipper became, the more influence he had with the railroads, and the larger concessions he was able to obtain. It was chiefly in this way that the great trusts obtained their power.

It was to the carrier's interest, also, to concentrate traffic as much as possible at large trade centers where it could be handled more cheaply, in large quantities, than in small lots at a number of small shipping points. This fact, together with the more violent competition for traffic between the railroads at the important cities, led to the establishment of rates to the latter points so much lower than those accorded the less important outlying districts, as to make it impossible for the suburban jobbers to do business in competition with those in the favored localities. A storm of protest hence arose, demanding a cessation of favoritism in rates between competitive localities.

5. Attitude of Carriers and their Officers Resulting from Lax Laws Intended to Stimulate Construction—Charging What the Traffic Will Bear.

Meanwhile the officials and stockholders of railroads had been led by our lax laws into believing that they could do with their

(3) See 1st Ann. Rep. 1 I. C. C. Rep. 261.

roads about what they pleased, entirely irrespective of the public interest. In order to stimulate construction they had been permitted to build as and where they chose, and after completion to operate as they saw fit. They naturally came to regard themselves not as in any sense occupying positions of public trust, with duties toward the community, but as the owners of an ordinary business enterprise, out of which they might properly get all they could. They had transportation for sale, and regarded it as their right and duty to obtain for it the best possible price. If conditions were such as to permit the exactions of very high rates, so much the better. If it was better business to allow concessions to powerful shippers, this was done without hesitation. The only duty recognized was that to the stockholders.

6. Acquisition by Railroad Officials of Interests in Enterprises Along Their Lines.

A further result of the public attitude during the growth of our railroads was that, until very recently, it was regarded as entirely proper for carriers or their officials or directors to acquire the ownership of, or an interest in, enterprises along the line of their road. This necessarily gave a strong incentive to favor these enterprises, the natural result of which was to build up the companies owned or controlled by the carriers or those in which their officers or directors held stock, at the expense of their competitors.

7. Alteration of the Public Attitude—Appointment of the Cullom Committee.

The bankruptcy of numerous roads and this growing favoritism to powerful shippers and to important localities, brought the people to realize that the vital problem was no longer how to stimulate further construction, but how to control the roads already in operation so as to make them serve the public to the best advantage.

The first step toward framing a law to meet and prevent the prevailing evils, was the adoption by the Senate on March 17, 1885, of a resolution authorizing the President to appoint a committee of Senators to investigate and report on the subject of the "regulation of transportation by railroad, and by water lines in competition or connection therewith, of freight and passengers between the several states." In pursuance of this resolution the Cul-

lom committee was appointed, consisting of Senator Cullom and four associates. The committee restricted itself to the determination of what legislation was most advisable on the subject. Its members visited cities and towns all over the United States, taking testimony. It also issued circulars containing questions to which answers were received from prominent merchants, railroad officials, state railroad commissioners and other persons having knowledge of existing conditions.

8. The Cullom Report.

The result of this investigation is embodied in what is known as the Cullom Report. This report sketched the growth of our railroads and traffic, the power of Congress over interstate commerce and the proper status of the common carrier, and pointed out the existing evils in railroad operation and how similar evils had been partly remedied by legislation in England and in the several states. It was clear to the committee that it was impracticable for Congress, or for a Commission appointed by it, to act as traffic manager for all the roads in the country or to attempt to fix their rates in advance. It was equally clear that the existing abuses required that a body be appointed to supervise interstate traffic and to give publicity to the objectionable practices of the carriers. The Act proposed by Senator Cullom and his associates was regarded by them as largely an experiment and rather as a basis for future revision than as a piece of finished legislation.

9. The Carrier at Common Law.

The recognition of the common carrier as a public servant, with duties toward the public different from those of an ordinary merchant to his customer, goes back to the earliest times. In the thirteenth and fourteenth centuries communities were isolated and in certain vocations there was practically no competition. All the village horses could be shod by one smith,—all sick persons bled by one surgeon, and a given stage route had business for but one carrier. The carrier, the blacksmith and the surgeon, however, were so important to the public that public interest required that any resident of the community should be able to rely with certainty on having his goods carried, his veins opened, or his horse shod when necessary. As a result of this condition of affairs, the public attitude crystallized into a rule of law that wherever

anyone held himself out to the community as exercising a public calling and was permitted to enjoy the monopoly attendant thereon, there devolved upon him the affirmative duty of serving all who applied and of charging only reasonable rates for the service rendered. Both these principles have survived to modern times, although not in connection with all the same occupations which gave rise to them. The public no longer regards the blacksmith as exercising a public calling, and the most sanguine surgeon has long since given up hope of ever again asserting a monopoly, but the public function and duties of the common carrier remain among the most important principles in our law.[4]

10. Reasons for more Stringent Legislation Against Carriers in Modern Times.

The development of the foregoing principles resulted largely from the fact that the public, having granted to certain persons special privileges, might reasonably require of them special duties. This is the reason given by the advocates of a great part of the recent legislation against the railroads and the trusts. But at the bottom of this legislation there is a much more important and rather socialistic principle. In a new community natural resources are best developed by allowing great individual liberty. When, however, this development has been allowed to go on for a certain time, the fittest soon begin to prove their right to survive, and to assert their superiority in a more and more marked degree, reaping the results of their ability in ever-increasing additions of wealth and power. This excites the jealousy of the poorer classes, who begin to realize that when extreme individual liberty has reached the point of having subjected the many to the few, it is of doubtful advantage to the community. As soon as the development which lax laws were intended to stimulate has been attained, the many usually regard it as time to curb the superior few before the ability and power of the latter has been diverted from the de-

(4) Although the blacksmith, the surgeon, and many other occupations have now ceased to be regarded as public callings, modern conditions have resulted in the recognition of a number of new vocations in this category. The most important of these is the public warehouseman. (See Munn v. Illinois, 94 U. S. 113; 24 L. Ed. 77), (1876). Any occupation in which it is possible to obtain a monopoly in matters essential to the public is likely to be placed on the list in the future.

velopment of the new wealth, to the mere acquisition from others of that wealth already created.

This is the whole problem of modern legislation,—how far the times warrant the legislators in letting the people alone. Too great restraint on the individual will necessarily curb enterprise and prevent rapid development; too little will allow a few men to acquire such enormous power as to turn the republic into an plutocracy. During the development period, therefore, laws are properly comparatively lax, but as the development progresses and the importance of efficient and proper operation becomes paramount to that of further construction, the old laws must be modified for the protection of the many. This modification should properly be a gradual one, but in this country nothing is done gradually. The carriers were permitted to rest secure in their arbitrary attitude until the abuses became so extravagant as to beget laws in some instances perhaps more radical than necessary.

11. Common Law Principles Embodied in the Act—Reasonable Rates—Equal Rates and Facilities.

The old common law principle that the rates charged by a common carrier must be reasonable, has come down to us without modification and has been embodied in the first section of the Interstate Commerce Act. The second of the principles above referred to,—that the common carrier must serve all who apply,—has been somewhat developed and modified under modern business conditions, and we find it expressed not as the affirmative duty to carry for all, but rather as the broader and perhaps negative duty of refraining from any discrimination among its patrons. Although authorities may be found to the effect that the common law required only that rates be reasonable and did not require them to be equal to all, the better authorities regard the discrimination principle merely as the logical growth of the common law idea of the function of the common carrier as a public servant.

In the old days, before the complexity of modern business offered the temptation or occasion for favoritism among individual shippers, the carrier's duty was regarded as the affirmative obligation to carry, but this duty depended on the fact that the carrier was carrying for the community. It was his carrying for some which made it his duty to carry for all without discrimination. The public nature of his service gave rise to the duty to treat all alike, and like treatment necessarily requires that the same rate be

charged and the same efficiency of service accorded to all similarly situated. The latter principle is found distinctly expressed in a number of the later common law cases and is embodied in the second and third sections of the Act.[5]

12. Defects in the Common Law.

The common law thus required that railroad rates must be reasonable and also prohibited discrimination between shippers, but it was entirely defective in not providing a practical means of carrying out these requirements. At common law a shipper aggrieved might bring his action for damages when charged an excessive rate or when his competitor was unduly favored in rates or services. Perhaps, also, even at common law, the courts had power to enjoin carriers from allowing unjust discriminations.[6] These remedies were entirely insufficient, however, to stop the abuses or to compensate the injured shippers. The amounts recoverable by individual shippers in such cases were scarcely ever large enough to pay for legal expenses and for incurring the ill will of the powerful carriers. Without some provision in the law requiring publicity on the part of the carriers, it was most difficult to prove favoritism toward the large shippers, even though such was known to exist. Further than this, the attitude of the carriers toward the public was such that their duty toward the shippers could not be enforced without the potential restraining effect of stringent penal provisions directed against the officers.

The principal defects in the common law may be summarized as follows:

1. No requirement of publicity of rates and practices; and no body to supervise railroad operation;

2. No criminal or penal provisions directed against the carriers or their officers;

3. No fixed standard of charge readily ascertainable by shippers, the only available standard being the rate charged others or the indefinite "reasonable rate";

4. No penal or criminal provisions against favored shippers securing or accepting improper concessions;

5. No requirement that connecting carriers form through routes and allow joint through rates;

(5) See infra, §116 n (1).

(6) See Northern Pac. R. Co. v. Pac. C. L. Ass., 165 Fed. 1, 5, (726).

6. No restriction on the acquisition by carriers or their officers of interests in mercantile enterprises along their lines, the ownership of which would present temptations to allow undue preferences;

7. No speedy procedure to stop discrimination, and no adequate or practicable remedy to injured shippers;

8. No requirement of equal treatment of connecting lines.

13. The Cullom Act and Changes in the Common Law Effected Thereby.

These defects in the common law were not all recognized by the Cullom Committee, nor did the Act proposed remedy them all. It required repeated amendments to produce the Interstate Commerce Act as it now stands. The Act of February 4, 1887, however, which was passed substantially as recommended by the Committee,[7] made important steps in the right direction. The principal changes in the common law by this Act were as follows:

1. It required publicity of rates and rules affecting rates, and provided that the only legal rate was that published and filed in accordance with the Act, thus creating a definite standard of charge equally accessible to all shippers;

2. It incorporated into a statute the common law duty of refraining from exacting unreasonable charges, and from unduly discriminating between shippers or localities in rates or facilities;

3. It created a Commission to supervise and regulate the publicity requirements, and also having limited powers to enforce the other provisions of the Act;

4. It gave to the Federal Courts jurisdiction to enforce by injunction the lawful orders of the Commission;

5. It created penal and criminal liability on the part of the officers of the carriers for violating provisions of the Act;

6. It required the allowance of equal facilities to connecting lines.[8]

14. Defects in the Cullom Act.

The principal defects in the law not remedied by this Act were as follows:

(7) For a summary of the legislation in the various states and in foreign countries up to 1890, see 4th Ann. Rep. Appendix E and G.

(8) This requirement (par. 2 of §3) has been practically construed out of existence by a number of courts, and its judicial meaning is still very doubtful. It has never been amended. See infra, Chap. XVIII.

1. As construed by the Courts, it gave the Commission no power to fix a rate for the future even after investigation of the reasonableness of the particular rate on complaint of a shipper;

2. It provided no summary remedy in the Courts, without previous investigation by the Commission, to prevent discriminations or to require the allowance of equal facilities among shippers;

3. It did not make it the duty of connecting lines to form through routes or to allow joint rates and gave the Commission no power to order their establishment;

4. It did not make shippers responsible for receiving rebates or concessions;

5. It did not attempt to prevent carriers or officers thereof from acquiring commercial interests antagonistic to their duty toward the public.

15. Amendments of 1889, 1891, 1893, 1895 and February 11th, 1903.

The first amendment to the Cullom Act was by the Act of March 2, 1889, which introduced the following important provisions into the law:

1. It provided a remedy by mandamus without previous investigation by the Commission in case of denial of equal facilities to shippers;

2. It created penal and criminal offenses on the part of shippers in respect to obtaining lower rates by means of false billing and similar devices;

3. It provided for punishment by imprisonment of the officers of carriers violating the provisions of the Act prohibiting the giving of rebates and discriminations:[9]

4. It required the publication of joint tariffs.[10]

These Acts were further amended by the Act of February 10, 1891, which enlarged the provisions of Section 12, relating to testimony before the Commission. The correction of certain constitutional defects in these provisions, pointed out by the Supreme Court,[11] required the further amendment of February 11, 1893.[12]

(9) The Act of 1887 provided only for fines.

(10) By the Act of 1887 the only tariffs required to be published and filed were those over the lines of the individual carriers.

(11) See infra, §305.

(12) This legislation was qualified by the Act of June 30th, 1906, known as the Immunity Act.

The amendment of February 8, 1895, added to Section 22 a proviso with reference to mileage tickets, and the Expediting Act of February 11, 1903, provided that appeals from the Circuit Court in certain cases under the Act should lie direct to the Supreme Court and should be given precedence over other causes.

16. The Elkins Act.

The Elkins Act,[13] approved February 19, 1903, made very important changes in the law:

1. It abolished imprisonment as a punishment for violating the Interstate Commerce Act;

2. It made the carrier corporation criminally responsible as well as its officers;

3. It made shippers who received rebates criminally liable for so doing;

4. It gave the Courts jurisdiction to enjoin violations of the Act without previous investigation by the Commission.

17. The Hepburn Act.

Finally, the Hepburn Act of June 29, 1906,[14] brought the legislation practically to its present shape.[15] The most important changes introduced by this amendment were as follows:[16]

1. It gave the Commission power, after due investigation, to fix rates to be observed in the future, and prescribed a prohibitive penalty—$5,000 per day—for disobeying the orders of the Commission made under Section 15 of the Act;

(13) For a copy of a bill to amend the Interstate Commerce Act, introduced by Senator Cullom in the session of 1899-1900, see Appendix C, to 13th Annual Report of the Commission.

(14) The joint resolution of June 30th, 1906, postponed the operation of the Hepburn Act for sixty days. As to the effect of this resolution see U. S. v. Standard Oil Co., 148 Fed. 719, 722, (447).

For copy of the bill recommended by the Commission in 1905, see 19th Ann. Rep. 177.

(15) The Act of April 13, 1908, enlarged the provisions of Section 1, regulating the persons to whom passes might legally be issued.

(16) The foregoing sketch of this legislation is not intended as a complete summary, but merely to give a general idea of the way in which the present Act has developed. For a complete statement of the changes effected by the various Acts, see notes to the text of the Act as printed supra, pages 1 to 51.

2. It required connecting lines to form through routes with joint rates applicable thereto and gave the Commission sufficient power to enable it to carry out this requirement;

3. It made it the statutory duty of carriers to provide and furnish transportation on reasonable request therefor;

4. It prohibited carriers from transporting commodities produced by them or in which they had an interest;

5. It restored the imprisonment clause expunged by the Elkins Act and created a number of other punishable offenses;

6. It required carriers to construct, maintain, and operate switch connections for shippers and for lateral branch lines;

7. It introduced a clause regulating the issuance of passes;

8. It altered the time of notice of increase or reduction of rates to 30 days, and otherwise modified the requirements with regard to publication and filing of rates;

9. It gave the Commission power to regulate allowances to shippers for services;

10. It extended the operation of the Act to express and sleeping car companies and to pipe lines;

11. It increased the membership and salaries of the Commissioners;

12. It gave the courts additional powers to issue mandamus;

13. It introduced a provision making carriers, parties to through transportation, liable for losses beyond their own lines, and forbidding limitation of liability;

14. It regulated the methods for enforcing the orders of the Commission, both orders for the payment of money and those other than for the payment of money, in the latter case expunging the provision that the findings of the Commission should be *prima facie* evidence;

15. It introduced regulations governing suits to set aside or suspend orders of the Commission;

16. It introduced provisions regarding the reports and accounts to be furnished by carriers to the Commission.

18. Present Defects in the Law.

It is not within the purview of the present work to enter into a discussion of the many suggestions as to additional powers, outside of the present scope of the Act, which might be conferred on the Commission, such as the regulation of the issuance of securi-

ties by carriers,[16] etc. Certain changes in the Act would seem necessary, however, to render its present provisions effective. The following additions might be suggested:

1. The Commission at present has probably no power to pass on the reasonableness of a rate until such rate has gone into effect. It should be given this power, and also power to prevent the carriers from putting in force a proposed rate until it had investigated the propriety of such rate.[17]

2. In regulating through rates and joint tariffs the Commission should have power to regulate the interchange of cars between connecting lines. Under the present law it would seem not to have this power.[18]

3. The findings of fact by the Commission, in cases not involving claims for damages, might be made conclusive. This is the case under the English Act, and there is room for argument that it is also the law under the Hepburn amendment, but the terms of our Act are not entirely clear on the subject, and would seem to point to the conclusion that the Commission's findings, except in damage cases, are not now even *prima facie* evidence of the facts found.[19]

(16) See 21st Ann. Rep. p. 9.
(17) See ibid.
(18) See infra, §278.
(19) See infra, §331.

CHAPTER II.

SCOPE OF THE ACT—PURPOSE—RULES OF CONSTRUCTION APPLICABLE—GENERAL CONSIDERATIONS.

19. Expressions by Commissioners and Courts as to the Purpose of the Act.
20. General Rules of Construction Applicable to the Act.
21. Judge Jackson's Dictum in the Kentucky Bridge Case.
22. The Act did not Create New Powers in the Carriers.
23. The Act Applies only to the Carrier's Duties toward Shippers and Passengers.
24. Duty to Provide Adequate Service and Facilities—Through Routes, Joint Rates and Switch Connections.
25. Charges for Incidental Services.

19. Expressions by Commissioners and Courts as to the Purpose of the Act.

Obviously the purpose for which the Act to Regulate Commerce was passed, was to remedy the recognized evils and abuses in the operation of our railroads. These consisted in the exaction of excessive charges to or from non-competitive points, in the preference in rates and consequent building up of certain favored localities at the expense of outlying points, and principally in the allowance of special facilities and concessions in rates to large and powerful shippers, enabling them to drive their weaker competitors to the wall.

Both the Commission and the Courts have, on a number of occasions, stated their views as to the purpose which the Act was intended by Congress to subserve, and it is believed that a collection of such quotations may be of use to the practitioner.

In its Second Annual Report the Commission said:[1]

"The purpose of the Act to Regulate Commerce may be summed up in a single phrase; it is to bring the railroads of the country under the control of law representing an enlightened public opinion."

Again, in Re Chicago, St. P. & K. C. R. Co.,[2] Chairman Cooley said:

(1) 2 I. C. C. Rep. 442, (1888).
(2) 2 I. C. C. Rep. 231, 259, (58).

"As a matter of public history nothing can be more notorious than that the Act to Regulate Commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for their service, should have the benefits which the law had undertaken to give, but of which in very many cases it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the Act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other. . . . . Everywhere in the Act the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public, be wronged by arbitrary conduct or by favoritism, or be subjected to extortion."

The purpose of the Act, with regard to its effect on competition between railroads, was thus stated by Commissioner Veazey:[3]

"To preserve legitimate competition between public carriers, and to prevent that competition which is illegitimate, that is, competition which is not contrary to the public interest, or in other words, opposed to the public welfare, is precisely that which, among other things, the law undertakes to accomplish."

With regard to the preference of one locality over another by the railroads in rates and facilities, so prevalent at the time of the passage of the Act in 1887, Commissioner Clements said:[4]

"The building up of one locality at the expense of another, by rates favoring the former and discriminating against the latter,

(3) Gerke Brewing Co. v. Louisville & N. R. Co., 5 I. C. C. Rep. 596, 606, (**164**).

See also to the same effect, Re Export & Dom. Rates, 8 I. C. C. Rep. 214, 260, (**265**).

Central Yel. Pine As. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 541, (**369-A**).

Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 580, (**370**).

East Tenn., V. & G. R. Co. v. I. C. C., 99 Fed. 52, 61, (**162-C**).

I. C. C. v. Chicago, G. W. R. Co., 141 Fed. 1003, 1014, (**364-B**).

(4) Hampton B'd. of Tr. v. Nashville, C. & St. L. R. Co., 8 I. C. C. Rep. 503, 522, (**281-A**).

was undoubtedly one of the principal evils which the Act to Regulate Commerce was designed to remedy."

In the important case of New York, N. H. & H. R. Co. *v.* I. C. C.,[5] Mr. Justice White said:

"It cannot be challenged that the great purpose of the Act to Regulate Commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. . . . .

"If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

The same Justice in a later case said:[6]

"When the Act to Regulate Commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. Parsons *v.* Chicago & Northwestern Ry., 167 U. S. 447, 455; Interstate Commerce Commission *v.* Baltimore & Ohio R. R., 145 U. S. 263, 275. That the Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act. Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. Cincinnati, New Orleans & Texas Pacific

(5) 200 U. S. 361, 391, 392; 26 Sup. Ct. 272; 50 L. Ed. 515, (339-B).

(6) Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 439; 51 L. Ed. 553; 27 Sup. Ct. 350, (454).

Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 184; Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479."

In another leading case, Justice Shiras thus stated the purpose of the Act:[7]

"The purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable and to forbid undue and unreasonable preferences and discriminations."

The purpose of the Interstate Commerce Act was not to reenforce the tariff laws.[8] Nor was it the intent of Congress in passing it to effect the exclusive regulation of railroads.[9]

Other expressions by Federal Judges and Justices are as follows:

"It thus appears that the intention of Congress, as expressed in Sections 1, 2 and 3, was to secure two leading objects, or effect two main purposes, viz.: First, to establish and impose upon railroad companies engaged in interstate commerce, the duty of conforming to the general rule of the common law in making their charges for transportation services rendered reasonable and just; and, second, to prevent unjust inequality, partiality, favoritism, or unfairness, so far as concerned their charges for contemporaneous transportation services, as between persons, traffic, or localities similarly circumstanced."[10]

"The principal objects of the Interstate Commerce Act, as

(7) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 233; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

See also Southern Pac. R. Co. v. I. C. C., 200 U. S. 536, 552; 26 Sup. Ct. 330; 50 L. Ed. 585, (302-E).

(8) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 221; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

Cf. Florida Assoc. v. Atlantic C. L. R. Co., 14 I. C. C. Rep. 476, 502, (710).

(9) U. S. v. Trans-Missouri Fr. As., 166 U. S. 290, (1897); 17 Sup. Ct. 540; 41 L. Ed. 1007. In this case the Circuit Court held that the Sherman Anti-Trust Act did not apply to railroads, on the ground that the Act to Regulate Commerce was intended to be a complete system controlling them, but this decision was reversed by the Supreme Court.

See also Meeker v. Lehigh Val. R. Co., 162 Fed. 354, (646).

(10) Jackson, J., in I. C. C. v. Baltimore & O. R. Co., 43 Fed. 37, 47, (91-B).

shown by the many cases in the Supreme Court of the United States, were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like service under similar circumstances and conditions; to prevent undue and unreasonable preference to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freight. It was not designed to prevent competition between different roads, but rather to encourage competition." [11]

"The object of the statutes relating to interstate commerce is to secure the transportation of persons and property by common carriers for reasonable compensation." [12]

20. General Rules of Construction Applicable to the Act.

In one of the first important decisions construing the Interstate Commerce Act, the Supreme Court expressed the view that this Statute was intended by Congress to cover the whole field of commerce, both interstate and foreign, to which the power of Congress extended.[13] This interpretation of the Act would not seem to have been literally followed in other decisions. In a case reported in the same volume [14] the Court, in a dictum, propounded a test of the application of the Act to lines situated wholly within a State but connecting with lines crossing the border, which has exempted from the operation of the Act a num-

(11) Bethea, D. J., in I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1014, (364-B).

(12) Landis, D. J., in U. S. v. Chicago & A. R. Co., 148 Fed. 646, 648, (430-A).

See also Union Pac. R. Co. v. Goodridge, 149 U. S. 680, 690; 13 Sup. Ct. 970; 37 L. Ed. 986, (68-B).

(13) Texas & Pac. R. Co. v. I. C. C. Rep., 162 U. S. 197, 211-212; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

In Mattingly v. Pennsylvania Co., 3 I. C. C. Rep. 592, 602, (98), Commissioner Schoonmaker said:

"The commerce intended to be regulated by the Act is that over which the jurisdiction of the law-making power extends and the regulations provided must be deemed co-extensive with the scope of the power, and with only such limitations as the Act itself makes."

(14) Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184; 16 Sup. Ct. 700; 40 L. Ed. 935, (132-C). See infra §29 et seq.

ber of roads and considerable traffic over which Congress, if it chose, might undoubtedly assume jurisdiction, and which the Act itself might reasonably be construed to cover.

It may be safely said, however, that the present tendency of the Courts is to give the Act a broad construction, and that, in a civil case, where its application to a given road or shipment is doubtful, this doubt would probably be resolved in favor of the position that the Act should be applied. As said by Mr. Justice White in a recent case:[15]

"To this extent and for these purposes" (to secure equality of rates as to all and to destroy favoritism) "the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

The penal provisions of the Act, however, are to be strictly construed, in accordance with the well recognized legal principle to that effect.[16]

21. Judge Jackson's Dictum in the Kentucky Bridge Case.

In the Party Rate Case[17] Judge Jackson, in the lower Court, gave utterance to a much quoted dictum. He said:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage,

(15) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361, 391; 26 Sup. Ct. 272; 50 L. Ed. 515, (**339**-B).

See also Re Express Cos., 1 I. C. C. Rep. 349, 362, (1887).

(16) I. C. C. v. Bellaire Z. & C. R. Co., 77 Fed. 942, (**213**).

Camden Iron Works v. U. S., 158 Fed. 561, 564-5, (**449**-B).

See, however, U. S. v. Chicago, I. & L. Ry. Co., 163 Fed. 114, 117, (**663**).

And infra, §343.

(17) I. C. C. v. Baltimore & O. R. Co., 43 Fed. 37, 50, (**91**-B).

This dictum has been quoted and paraphrased in a number of later cases. See I. C. C. v. Alabama Mid. R. Co., 74 Fed. 715, 723; 21 C. C. A. 51; 41 U. S. App. 453, (**170**-C).

Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184, 197; 16 Sup. Ct. 700; 40 L. Ed. 935, (**132**-C).

I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144, 172; 42 L. Ed. 414; 18 Sup. Ct. 45, (**170**-D).

I. C. C. v. Chicago Great W. R. Co., 209 U. S. 108, 119; 52 L. Ed. 268; 28 Sup. Ct. 493, (**364**-C).

or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts, looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."

Unless this passage is read with a full understanding of the cases decided under the Act, it is perhaps misleading. If all that it means is that the Act does not make the Commission a general manager of all the railroads in the country, which they must all consult before taking any action, and that carriers are still free to manage their business as they please so long as they do not violate the provisions of the law,[18] it is undoubtedly true. Judge Jackson's dictum would seem to ignore, however, the most important restriction on the carrier's action which the Act introduced into the law, the requirement of the publication of tariffs and adherence thereto. Judge Jackson's "two leading prohibitions" were taken from the common law, but Section 6 of the Act was entirely new, and was by far the most important part of the legislation.

22. The Act did not Create New Powers in the Carriers.

The Act did not create new powers in any railroads but simply regulated those already existing. Where, therefore, one road had by agreement allowed another to run trains over its tracks with the proviso that the latter should do no local business, the Com-

(18) In Traer v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 165, 169, (679), Prouty, C., said:

"The Act to Regulate Commerce leaves the carriers to initiate their own rates, rules, and regulations. This Commission should only interfere when that becomes clearly necessary to prevent some wrong forbidden by the Act."

See also quotation from Corn Belt As. v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 376, 394, (704), (infra §80) and from Banner Co. v. New York Cent. & H. R. R. Co., 14 I. C. C. Rep. 398, 408, (567), infra, §85 n22.

mission refused to require the stoppage of its trains at local stations, on complaint of discrimination against such stations.[19]

23. The Act Applies Only to the Carrier's Duties Toward Shippers and Passengers.

The Act deals only with the obligation of the carriers *qua* common carriers,[20] and in no way regulates or interferes with matters not involving their duty to shippers or passengers as such. It does not prevent a railroad from leasing all its refrigerator cars from one individual or company, though the latter be a large shipper in addition to being a lessor of such cars;[21] nor does it require the hauling of a particular make of private car;[22] nor render it illegal for a carrier to make an exclusive contract with a particular Stockyards Company,[23] or to give to a favored hack-

(19) Alford v. Chicago, R. I. & P. R. Co., 3 I. C. C. Rep. 519, 531, (95).

In this case the local service by the lessor line was admittedly adequate (p. 532).

(20) In American Warehouseman's Ass. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, 589, (247), Yeomans, C., said:

"The function of a common carrier is to receive, transport and deliver."

(21) Consolidated For. Co. v. Southern Pac. R. Co., 9 I. C. C. Rep. 182, 206e, (302-A).

Re Transportation of Fruit, 10 I. C. C. Rep. 360, 373-4 (357-A).

U. S. ex rel. Morris v. Delaware, L. & W. R. Co., 40 Fed. 101 (87).

(22) Worcester Car Co. v. Pennsylvania R. Co., 3 I. C. C. Rep. 577, (97).

In this case Commissioner Bragg said, (p. 581):

"The tracks of a railroad company are not a common highway upon which anyone can enter and use his own vehicle of transportation against the will of the Company."

See also Michigan Cong. Water Co. v. Chicago G. T. R. Co., 2 I. C. C. Rep. 594, (74).

Ruttle v. Pere M. R. Co., 13 I. C. C. Rep. 179, 185, (595).

5th Ann. Rep. 34-41.

(23) Kentucky R. Com. v. Louisville & N. R. Co., 10 I. C. C. Rep. 173, (343).

Butchers, etc., Co. v. Louisville & N. R. Co., 67 Fed. 35; 14 C. C. A. 290; 31 U. S. App. Rep. 252, (194).

Central Stockyards Co. v. Louisville & N. R. Co., 118 Fed. 113; 63

driver exclusive privileges for securing the patronage of passengers at the carrier's depot.[24] In the case last cited Judge Baker said:[25]

"Through all these particulars, namely, the relations between railroad companies and newsdealers, fruit venders, restaurateurs, hotel runners, hackmen, baggage agents, transfer companies, express companies, sleeping car companies, and pass holders, there runs one common principle: Whatever a railroad company does as a common carrier, it is compelled to do for all without discrimination. Whatever it may lawfully do outside of its obligations as a common carrier is a matter of favor. And by the term, favor goes not by right."[26]

24. Duty to Provide Adequate Service, Facilities, Through Routes, Joint Rates and Switch Connections.

Prior to the Amendment of 1906 the Act did not require carriers to provide adequate service or facilities, although this duty clearly existed at common law; the Act simply prohibited unreasonable charges, discriminations, preferences, etc., in regard to the services actually performed.[27] The Hepburn Act, however, added to Section 1 a clause making it the carriers' duty to provide and furnish transportation, including refrigeration and similar facilities. It is doubtful, however, if this provision gives to the

L. R. A. 213; 55 C. C. A. 63, (**300**-B); 192 U. S. 568; 24 Sup. Ct. 339; 48 L. Ed, 565, (**300**-B).

See, however, Keith v. Kentucky Cent. R. Co., 1 I. C. C. Rep. 139, (**26**).

(24) Donovan v. Pennsylvania Co., 120 Fed. 215; 57 C. C. A. 362; 61 L. R. A. 140, (1903); 199 U. S. 279; 26 Sup. Ct. 91; 50 L. Ed. 192, (1905).

(25) 120 Fed. 215, 218.

(26) As to compress companies see, however, the decision of the Commission in Chickasaw Co. v. Gulf C. & S. F. R. Co., 13 I. C. C. Rep. 187, (**596**).

See also infra §§123, 174.

(27) Richmond Elevator Co. v. Pere Marquette R. Co., 10 I. C. C. Rep. 629, 636, (**372**).

Re Transportation of Fruit, 10 I. C. C. Rep. 360, 373, (**357**-A).

Red Rock Fuel Co. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 438, 450, (**404**).

Commission any power to regulate the physical operation of railroads.[28]

The Hepburn Act also made it the statutory duty of interstate carriers, under certain specified conditions, to form through routes with joint rates applicable thereto,[29] and also to allow switch connections to shippers and to lateral branch roads.[30]

25. Charges for Incidental Services.

The Act relates not only to charges for transportation proper but also to charges for services rendered in connection therewith, where such services are a necessary incident to the transportation in question, as for instance, refrigeration charges for perishable fruit. This was true, even before the Hepburn Act expressly defined transportation as including such services.[31]

(28) See infra §§267-269.

(29) See infra §§276-279.

(30) See infra §§258-259.

For a sketch of other additions to the law made by this Amendment, see supra §17.

(31) Truck Farmers' Association v. Northeastern R. of S. C., 6 I. C. C. Rep. 295, 317, (**191**-A).

Re Transportation, etc., of Fruit, 10 I. C. C. Rep. 360, 374, (**357**-A).

Consolidated Forwarding Co. v. Southern Pac., et al., 10 I. C. C. Rep. 590, 615, (**371**); (but see Knapp, Ch., dissenting in 9 I. C. C. Rep. 2061).

Re Transportation, etc., of Fruit, 11 I. C. C. Rep. 129, 136, (**357**-B).

Knudsen-Ferguson Fruit Company v. Michigan Cent. R. Co., 148 Fed. 968; 79 C. C. A. 46, (**441**).

CHAPTER III.

SCOPE OF THE ACT—WHAT TRANSPORTATION AND CARRIERS ARE SUBJECT TO THE ACT.

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41. Foreign Commerce.
42. Rail and Water Traffic.
43. Wagon and Team Traffic.
44. Carriers Subject to the Act — Express Companies — Street Railways & Electric Railroads—Omnibus Companies — Stockyards Companies—Bridge Companies Receivers.

26. Provisions of the Act Defining its Scope.

The first Section of the Act defines its scope as follows:

"The provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by

means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purposes of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State, or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

"The term 'common carrier' as used in this Act shall include express companies and sleeping car companies. The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit,

ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

27. Interstate Commerce Distinguished from Intra-state—The Act Not Applicable to the Latter.

The Commerce Clause of the Constitution gives Congress no power to regulate commerce wholly within a State. By the express terms of the proviso at the end of the first paragraph of Section 1 of the Interstate Commerce Act, the Act has no application to purely intra-state transportation.[1] The obvious purpose of this proviso was to have it entirely clear that Congress, in this Act, was attempting to regulate only such commerce as the Constitution placed under its control.[2]

28. Same Subject—Concurrent Intra-state Regulations Cannot Oust Federal Jurisdiction Over Interstate Shipments—State Statutes in Conflict with the Act Void.

The fact that a State has control over a given situation, as constituting intra-state commerce, does not preclude the concurrent regulation of the same matter by the Commission, if it also materially affects interstate commerce. The fact that a State may

(1) New Jersey Fr. Exch, v. Central R. of N. J., 2 I. C. C. Rep. 142, 145, (**54**).

Mattingly v. Penn. Co., 3 I. C. C. Rep. 592, 609, (**98**).

Parks v. Cincinnati & M. V. R. Co., 10 I. C. C. Rep. 47, 53, (**337**).

Gallogly v. Cincinnati, H. & D. R. Co., 11 I. C. C. Rep. 1, 12, (**381**).

Rogers v. Philadelphia & R. R. Co., 12 I. C. C. Rep. 308, 311, (**513**).

Haines v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 214, 217, (**599**).

See, however, Majestic Coal Co. v. Illinois Cent. R. Co., 162 Fed. 810, (**647**).

Chicago & A. R. Co. v. I. C. C. 000 Fed. ——, (**631-B**).

And cf. Reliance Works v. Southern R. Co., 13 I. C. C. Rep. 48, 54, (**575**), as regards the power of the Commission and the Courts to prevent the preference of intrastate commerce over interstate, (infra §172).

(2) In the Trade Mark Cases, 100 U. S. 82; 25 L. Ed. 550, decided in 1879, the Supreme Court had held that an Act of Congress which by its terms was applicable to intrastate as well as to interstate commerce was unconstitutional.

compel a railroad to put in a siding for a coal shipper for intra-state shipments does not prevent the Commission from ordering the carrier, under the Act, to cease discriminating against him by refusing him a switch connection for interstate shipments, while allowing such to his competitors.[3]

State Statutes in conflict with the Act are void.[4]

29. Same Subject—Effect of Participation in Interstate Traffic by Intra-state Carrier.

A question which has produced considerable confusion in the decisions, and which the Supreme Court does not yet seem to have cleared up satisfactorily, is to what extent participation in shipments originating at, or destined for other States is sufficient to bring within the Act a carrier whose line is situated wholly within one State.

In this connection it must be remembered that there are two sets of cases in which the above question may arise: the one in which a given carrier is required by the Commission to furnish statistics as to its general operation; and the other where the Act is applied to the carriage of a particular shipment or lot of traffic. In the former case the doing of any interstate business whatever makes the carrier subject to the Commission and bound to report to it all matters affected by such business, while in the latter case

(3) Red Rock Fuel Co. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 438, 452, (404).

See also Wilson Produce Co. v. Penna, R. Co., 14 I. C. C. Rep. 170, 173-175, (680).

And cf. Admin. Rul. No. 54, (March 16, 1908).

(4) Gulf C. & S. F. R. Co. v. Hefley, 158 U. S. 98; 15 Sup. Ct. 802; 39 L. Ed. 910, (1895).

Texas & Pac. R. Co. v. Mugg, 202 U. S. 242; 50 L. Ed. 1011; 26 Sup. Ct. 628, (428), (1906).

McNeill v. Southern Ry. Co., 202 U. S. 543; 26 Sup. Ct. 722; 50 L. Ed. 1142, (1906).

St. Louis & S. F. R. Co. v. Carden, 34 S. W. 145, (Tex. Civ. App.), (1896).

Missouri, K. & T. R. Co. v. Fookes, 40 S. W. 858, (Tex. Civ. App.), (1897).

Fielder v. Missouri, K. & T. R. Co., 42 S. W. 362, (Tex. Civ. App.), (1897).

Spratlin v. St. Louis & S. F. R. Co., 76 Ark. 82; 88 S. W. 836, (1905).

People v. Chicago, I. & L. R. Co., 223 Ill. 581; 79 N. E. 144, (1906).

Larabee Co. v. Missouri Pac. R. Co., 74 Kas. 808; 88 Pac. 72, (1906).

a carrier doing a large interstate business may be exempt from the provisions of the Act as regards certain intra-state shipments.

30. Same Subject—The "Common Arrangement" Test—Effect of the Hepburn Amendment.

It will be noted that in Section 1 of the Act, the parenthesis around the words "or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment" was inserted by the Hepburn amendment, the clause having been without this punctuation in the original Act. The insertion of the parenthesis clearly indicates that Congress intended the "common arrangement" test to be applicable only to rail and water lines and not to connecting railroads, one of which is situated wholly within a single State. Indeed this interpretation of the clause would seem to have been the reasonable one under the original Act,[5] especially if the Act is to be construed as coextensive with the power of Congress except as otherwise expressly provided.[6]

Such being the case, the "common arrangement" test is not the proper one to determine the application of the Act to shipments over intra-state roads, unless these are used in connection with a water line, since the power of Congress over intra-state roads is clearly not restricted to traffic brought from other States by other lines "under a common control, management, or arrangement for a continuous carriage or shipment." In other words, by virtue of the "common arrangement" clause Congress excepted from the operation of the Act certain rail and water traffic which it was in its power to regulate, but in regard to traffic "wholly by railroad" it showed no indication of any intention but that the scope of the Act should be entirely coextensive with its power.

31. Same Subject—Decisions Prior to the Hepburn Act—Dictum in the Social Circle Case.

Prior, however, to the insertion of the parenthesis by the Hep-

(5) See Vermont St. Gr. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, 176, (24), where the Commission suggested this interpretation without committing itself to it.

(6) This is the method of interpretation suggested in The Import Rate Case, Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 211-212; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

burn Act, the Supreme Court, in the Social Circle case,[7] applied the "common arrangement" test to all-rail traffic. In this case the question was as to whether the defendants were violating the "long and short haul" clause of the Act by charging a higher freight rate from Cincinnati, O., to Social Circle, Ga., than to Atlanta, Ga., a more distant point on the same line. The freight was hauled from Augusta, Ga., to Social Circle, and to Atlanta, by the Georgia R. Co. The defendants contended that although the Atlanta traffic was through interstate business and subject to the Act, yet the Social Circle traffic was not, since as to it no through rate was named by the participating roads, each receiving its local rate in or out of Augusta. It was held that the Social Circle traffic was subject to the Act because, by the mutual participation of the connecting lines in through rates and charges, and by their recognition of through bills of lading, they had in fact entered into a "common arrangement" for the "continuous carriage" of the traffic.

32. Same Subject—"Common Arrangement" Test not Properly Applicable to All-rail Traffic.

Under the "common arrangement" test, this reasoning would be entirely proper, but as a test of the application of the Act to all-rail traffic under the Act as it now reads, it would seem to be open to doubt. If a common arrangement is necessary to subject certain traffic to the Act, then clearly the attitude of the carrier toward such traffic is material. Thus, a water line, by preserving its entire independence of connecting roads, may remain free from the present Federal legislation. But the attitude of the carrier has nothing to do with the question as to whether given traffic is intra-state and beyond the power of Congress, or interstate and subject to its authority. This depends on the relation of the consignor and consignee. If a man in Philadelphia sells a horse to one in Chicago and ships it to the purchaser there, this is interstate commerce, and all the carriers who participate in the shipment are engaged in interstate commerce no matter whether they act together or separately. Their attitude or intention can in no way change the character of the transaction. Anyone who helps

(7) Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184; 16 Sup. Ct. 700; 40 L. Ed. 935, (132-C).

See infra, Chaps. XII, XVI and XVII.

the Philadelphia vendor to get the horse to the purchaser at Chicago is engaged in interstate commerce whether he will or no.[8]

Congress would seem clearly to have recognized this when it inserted in the Act the seventh section, providing that no stoppage, breakage of bulk or other device on the part of the carriers should remove the traffic from the application of the Act. A single carrier hauling goods for the whole or for a part of a journey from one State to another cannot deprive the traffic of its interstate character by frequent stops and new starts;[9] no more can two connecting carriers do this by refusing to act in conjunction with one another.

33. Same Subject—Effect of Social Circle Dictum on Later Decisions.

The Federal Courts, however, following the dictum in the Social Circle case, have applied the "common arrangement" test to all-rail traffic, permitting a road situated wholly within one State to remain exempt from the provisions of the Act merely by its refusal to enter into any relations for continuous service with connecting lines, even though it participated in traffic shipped by a consignor in one State to a consignee in another, by the most direct and continuous route obtainable.[10]

(8) See U. S. v. Colorado & N. W. R. Co., 157 Fed. 321, 342, (1907), cases arising under the Safety Appliance Acts.

In its Fourth Annual Report the Commission would seem to have taken this view of the scope of the Act. It there said:

"Whenever the State road gives, receives or acts upon through shipping bills, for transportation of interstate traffic over its line, or even receives and carries such traffic for delivery to another carrier, when its destination is distinctly made known, and is a point beyond the state boundary, it thereby, as a carrier of interstate traffic, becomes subject to the Act to Regulate Commerce." 4 I. C. C. Rep. 400, (1890).

See also Leonard v. Kansas City So. R. Co., 13 I. C. C. Rep. 573, (645), infra §33.

Cases involving the question as to whether shipments are interstate or intrastate are often confused with those involving the distinction between local traffic and through traffic at joint through rates. In the latter question the attitude of the carrier is all-important. See infra, Chap, IV.

(9) See New Jersey Fr. Ex. v. Central R. of N. J., 2 I. C. C. Rep. 142, 145, (54).

(10) I. C. C. v. Bellaire, Z. & C. R. Co., 77 Fed. 942, (213).
U. S. ex rel. I. C. C. v. Chicago, K. & S. R. Co., 81 Fed. 783, (227).

In the first of these cases Judge Sage expressly stated that the traffic

The Commission has accepted as authoritative the common arrangement test as laid down in the Social Circle case, and, until recently, has applied it to all-rail shipments. In almost all cases, however, involving the question, it has held the facts presented a common arrangement which made the participating lines subject. In one decision it held that a foreign road which participated in the carriage of passengers from points in the United States through Canada to another point in the United States but which was acting under no joint arrangement with any lines within the United States, was not subject to the Act by reason of its absorption of the charges of the roads within the United States.[11] But in a recent case, decided since the Amendment of 1906 went into effect, the majority of the Commission expressly stated that in its opinion the parenthesis introduced by the Hepburn Act extended the scope of the Act as regards traffic wholly by rail, and made the test no longer the volition of the carriers, but the character of the transaction.[12]

34. Same Subject—Gulf C. & S. F. R. Co. v. Texas.

The Supreme Court has never decided a case in which an intrastate road has been held not subject to the Act on the ground that it was party to no common arrangement with other railroads.

hauled by defendant brought it within the power of Congress although not within the purview of the Act as construed in the Social Circle Case. Both these cases arose on applications for mandamus to compel the filing of annual reports. In a subsequent case the Supreme Court held that prior to the Elkins Act (1903), the courts had no power to issue the writ in such cases. Both decisions were therefore, correct, although rested on grounds which it is submitted were unsound. See infra §339.

See also U. S. v. Geddes, 131 Fed. 452; 65 C. C. A. 320, (1904), and U. S. v. Colorado & N. W. R. Co., 157 Fed. 321, 342, (1907), decisions arising under the Safety Appliance Act.

Compare also Chicago, M. & St. P. R. Co. v. Becker, 32 Fed. 849, (1887).

(11) Re Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 593, 599, (248). See also infra, §189.

(12) Leonard v. Kansas City So. R. Co., 13 I. C. C. Rep. 573, (645). Here the freight was taken on through bills of lading, bringing it clearly within the test in the Social Circle Case. Commissioners Harlan and Clark and Chairman Knapp rested their concurrence solely on this ground and refused to accept the dicta with reference to the scope of the Act as affected by the insertion of the parenthesis.

The case of Gulf, C. & S. F. R. Co. *v.* Texas,[13] does not involve such a decision, for there the circumstance which removed the traffic in question from the operation of the Act, was not the attitude of the intra-state railroad in refusing to form a continuous line with roads running to and from points outside the State, but was the nature of the transaction between the consignor and consignee, the proper test of the intra-state or interstate character of a shipment. The original consignment was from Hudson or Kansas City, Mo., to Texarkana, Texas, but the goods having been sold in transit, on arrival at Texarkana were forwarded to Goldthwaite, Texas, on a new bill of lading by the order of the consignee. It was held that the latter shipment was not interstate commerce, and was properly subject to the control of the Texas statute.[14]

35. Same Subject—Proper Test not the Attitude of the Carriers but the Character of the Transaction.

The case above cited is authority for the position that the test of whether a shipment is or is not interstate commerce is not the continuity of the journey nor is it the intention of the consignee or his vendee as to the future movement of the freight. The true test is the nature of the transaction between the parties to the shipment in which the carrier in question participates. If a person in Philadelphia sells and ships goods to another in Pittsburg, the carriage of these goods is not interstate commerce, although the consignee all along intends to forward them immediately to points outside of Pennsylvania.[15] Where, however, the Phila-

(13) 204 U. S. 403; 27 Sup. Ct. 360; 51 L. Ed. 540, (**453***).

(14) In view of this decision, the case of Cutting v. Florida R. & N. Co., 46 Fed. 641, (1891), would seem to be of doubtful authority. In that case the Court intimated that Sec. 7 of the Act prevented shippers as well as carriers from altering the interstate character of a shipment by breakage of bulk, etc. This proposition is believed to be unsound.

(15) See also Missouri & Ill., etc., Co. v. Cape G. & S. W. R. Co., 1 I. C. C. Rep. 30, (**12**).

Hope Cotton Oil Co. v. Texas & P. R. Co., 10 I. C. C. Rep. 696, 703, (**380**).

St. Louis, H. & G. Co. v. Chicago, B. & Q. R. Co., 11 I. C. C. Rep. 82, (**383**).

Hope Cotton Oil Co. v. Texas & Pac. R. Co., 12 I. C. C. Rep. 265, (**509**).

delphia merchant sells goods to be delivered in Chicago and ships them in accordance with this contract, every carrier hauling this freight for any part of the distance is necessarily engaged in interstate commerce, and, by what is believed to be the proper construction of the Act, is subject, as regards such traffic, to its provisions.[16]

36. Same Subject—Decisions by the Courts Defining Test as to What is a Common Arrangement.

The decisions by the Courts and by the Commission as to what is sufficient to constitute a "common control, management, or arrangement" etc., between all-rail carriers are very numerous. Whether or not the tests established by these authorities would be applied to rail and water lines would appear to be somewhat doubtful.[17] As heretofore stated, the leading case discussing the question as to what constitutes a "common arrangement" is the so-called Social Circle case.[18] Justice Shiras there said:

"When the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates

Porter v. St. Louis, S. W. R. Co., 78 Ark. 182; 95 S. W. 453, (1906).

Laning-Harris Co. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 154, (590).

The Circuit Court refused to enforce the order for reparation issued in the first of the Hope Cotton Oil cases on the ground that the shipper had no right to avoid the payment of the higher through rate by transshipping at Texarkana, but this decision was rendered prior to the Supreme Court decision, above referred to, and in view of the latter would seem to be erroneous.

(16) If some agency other than a water line, such as a stage or wagon carrier, interrupted an all-rail shipment, this would, of course, remove the traffic from the jurisdiction of the Commission unless some part of it consisted in a continuous all-rail haul between two states, in which case it would have control of that part only. It is not believed, however, that the use in the Act of the words "wholly by rail" can be given the effect suggested by Commissioner Harlan in his concurring opinion in Leonard v. Kansas City So. R. Co., 13 I. C. C. Rep. 373, 392, (645), so as to withdraw from the Act all shipments not made under a common arrangement. To do this it would seem that some independent carrier, not subject to the Act, must intervene.

(17) See supra, §§29-35.

(18) Cincinnati, N. O. & T. P. R. Co. v. I. C. C. 162 U. S. 184, 192; 16 Sup. Ct. 700; 40 L. Ed. 935, (132-C).

and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal Act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the Commission, by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the State of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road, and exclude other points. . . . . When goods shipped under a through bill of lading, from a point in one State to a point in another, are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act to Regulate Commerce."

Following this decision, in the case of Louisville & N. R. Co. *v.* Behlmer,[19] the Supreme Court held that where an intra-state road participated in traffic which proceeded by a continuous route from the point of the origin, on through lines, to destination, and such participating road shared in the division of a total rate on a through bill of lading, the traffic was subject to the Act throughout the whole journey, although the last part of the haul over the line of the intra-state road was professedly at the local rate of such road, required by it as its share of the total charge.

These decisions do not require any express or formal arrangement between all-rail carriers to bring one of the roads, situated wholly within one State, under the operation of the Act. A common arrangement is implied from the carriers' treatment of the traffic in question.

(19) 175 U. S. 648, 44 L. Ed. 309; 20 Sup. Ct. 209, (186-D).

37. Same Subject—Statements by the Commission as to What Constitutes a Common Arrangement.

In Boston Fr. Ex. *v.* New York & N. E. R. Co.,[20] Commissioner Veazey said:

"There need not be a control of the through line centred in a single source of authority, but if the different carriers have invited interstate traffic over their roads, which is intended to be continuous, and have arranged their business and put it in proper order so that the continuity of the shipment shall be preserved, have combined their several lines and by preparatory measures and disposition of their affairs have provided for the reception, carriage and delivery of the traffic, such business is plainly within the scope of the Act to Regulate Commerce."

In Trammell *v.* Clyde S. S. Co.,[21] the same Commissioner stated the rule as follows:

"The receipt successively by two or more carriers for transportation of traffic shipped under through bills for continuous carriage over their lines is assent to a common arrangement for such continuous carriage or shipment, and previous formal arrangement between them is not necessary to bring such transportation under the terms of the law.

"Traffic is either state or interstate traffic according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic and when carried over two or more lines, it is, by the fact of having been received, forwarded and delivered as one through shipment, transported under a common control, management or arrangement, as the case may be, for continuous carriage or shipment.

"The phrase 'common control, management or arrangement for continuous carriage or shipment' in the first section was intended to cover all interstate traffic carried through over all-rail, or part water and part rail lines. The 'arrangement' for continuous carriage or shipment is complete whenever the carriers have

(20) 4 I. C. C. Rep. 664, 677, (128-A).

(21) 5 I. C. C. Rep. 324, 369, (154-A). The decision by the Commission in this case was subsequently held by the Supreme Court to be erroneous, but not on the point for which it is here cited; I. C. C. v. Clyde S. S. Co., 181 U. S. 29; 21 Sup. Ct. 512; 45 L. Ed. 729, (154-B).

arranged for delivering and receiving through traffic to and from each other and such an arrangement is necessarily 'common.' " [22]

38. Same Subject—Through Bills of Lading a Usual but not Necessary Incident to a Common Arrangement.

The recognition of through bills of lading has usually been the circumstance relied on as showing a common arrangement. This is not essential, however, and an intra-state road not recognizing through bills of lading has been held subject to the Act.[23]

Other Federal cases in which the Act has been applied to intra-state carriers by reason of their participation in through traffic, are collected in the note.[24]

39. Same Subject—Shipments Originating and Ending in One State but Going Out of the State En Route.

When a shipment between points in the same State proceeds over a line which passes *en route* through another State or Terri-

(22) See also Heck v. East Tenn., V. & G. R. Co., 1 I. C. C. Rep. 495, (41).

Mattingly v. Pennsylvania Co., 3 I. C. C. Rep. 592, (98).

James & Mayer Co. v. Cincinnati, N. O. & T. P. R. Co., 4 I. C. C. Rep. 744, (132-A), (the Social Circle Case).

Troy B'd. of Tr. v. Alabama, Md. R. Co., 6 I. C. C. Rep., 1, 8, (170-A).

Cincinnati Fr. Bur. v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 233, (183-A).

Gustin v. Atchison T. & S. F. R. Co., 8 I. C. C. Rep. 277, 287, (266), (citing cases).

Pennsylvania Millers' Association v. Philadelphia & R. R. Co., 8 I. C. C. Rep. 531, 549, (283).

(23) U. S. ex rel. v. Seaboard Ry. Co., 82 Fed. 563, (233-A).

(24) Augusta So. R. Co. v. Wrightsville & T. R. Co., 74 Fed. 522. (205).

Interstate Stockyards Co. v. Indianapolis U. R. Co., 99 Fed. 472, (276).

U. S. v. Vacuum Oil Co., 153 Fed. 598, (468).

U. S. v. Pennsylvania R. Co., 153 Fed. 625, (470).

U. S. v. New York Cent. & H. R. Co., 153 Fed. 630, (471).

U. S. v. Standard Oil Co., 155 Fed. 305, (530).

U. S. v. Vacuum Oil Co., 158 Fed. 536, (572).

As to the burden of proving a common arrangement see U. S. v. Pennsylvania R. Co., 153 Fed. 625, 628, (470). This was a case involving the distinction between local and through joint traffic.

As to the effect of participation in through traffic in making a carrier criminally responsible for the observance of tariffs filed by connecting lines, see infra, Chapter XXVII, § 351.

tory, this is interstate commerce subject to the Act.[25] Whether the same rule would hold in case of a shipment through the United States from one foreign country to another has never been decided, but it is believed that such traffic would be held to be subject to the Act,[26] especially if, during the journey, the freight were transshipped to or from vessels at ports of the United States.[27]

40. Transportation Within a Territory and Between Two Territories.

The original Act applied to commerce between a State and a

(25) New Orleans Cot. Exch. v. Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. Rep. 375, 386, (66).

Milk Producers' Ass'n. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 158, (220).

U. S. v. Delaware, L. & W. R. Co., 152 Fed. 269, (452).

Chicago, St. P., M. & O. R. Co. v. U. S., 162 Fed. 835, 836, (450-B).

Hanley v. Kas. C. S. R. Co., 187 U. S. 617; 23 Sup. Ct. 214; 47 L. Ed. 333, (1903), (a case not arising under the Interstate Commerce Act).

Contra U. S. ex rel. v. Lehigh Valley R. Co., 115 Fed. 373, (1902).

Minneapolis Chamber Com. v. Great N. R. Co., 5 I. C. C. Rep. 571, 580, (163).

Campbell v. Chicago, M. & St. P. R. Co., 86 Ia. 587; 53 N. W. 351; 4 Int. Com. Rep. 203, (1892).

Seawell v. Kansas City, H. S. & M. R. Co., 119 Mo. 222; 24 S. W. 1002; 5 Int. Com. Rep. 262, (1893).

See also Cincinnati Packet Co. v. Bay, 200 U. S. 179, 183; 26 Sup. Ct. 208; 50 L. Ed. 428, (1906).

On principle might there not be a question as to whether the trading between two persons in the same state could be called interstate commerce, merely because the goods in the course of delivery pass through another state? The transportation is perhaps interstate but the commerce would seem to be intrastate. A sale by one American to another does not become an international transaction by reason of the seller's agent being of a different nationality.

(26) The proviso at the end of Sec. 1 to the effect that the Act is not to be applied to traffic "wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid," would seem to show that Congress intended to make traffic leaving a state en route subject to the Act. This argument would not appear to apply to traffic passing through the United States on a haul between points in foreign countries, unless the word "and" in the proviso may be read "or."

(27) See infra, §§235, 236. The Commission is disposed to split up rail and ocean shipments, even though these are part of a through haul.

Territory,[28] or between a State and the District of Columbia,[29] or between two Territories,[30] but probably not to commerce wholly within a single Territory.[31] The Amendment of 1906, however, makes the latter traffic subject to its provisions.

After the admission of a Territory into the Union, the Commission has no longer power to award reparation on shipments within that Territory prior to the date of admission, even on a complaint filed before that date.[32]

41. Foreign Commerce.

The Act does not apply to a discrimination between two Canadian points, on shipments into the United States.[33] Nor does it apply to the foreign part of a through export or import shipment. It does, however, govern the part of such shipment within the United States.[34]

The Act covers shipments to interior points in adjacent for-

(28) See Re Coal Rates by Atchison, T. & S. F. R. Co., 10 I. C. C. Rep. 473, 480, (**367**).

Cf. also Hanley v. Kas. C. S. R. Co., 187 U. S. 617; 23 Sup. Ct. 214; 47 L. Ed. 333, (1903).

(29) Willson v. Rock Creek R. Co., 7 I. C. C. Rep. 83, (**219**).

(30) Blackwell, etc., Co. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 23, 26, (**456**).

(31) Ponca City Co. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 26, (**457**).

But see Re Coal Rates by A., T. & S. F. R. Co., 10 I. C. C. Rep. 473, 480, (**367**).

(32) Hussey v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 366, (**621**).

Chandler Co. v. Fort Sm. & W. R. Co., 13 I. C. C. Rep. 473, (**633**).

(33) Cist v. Michigan Cent. R. Co., 10 I. C. C. Rep. 217, 220, (**345**).

(34) New York B'd. of Tr. v. Pennsylvania R. Co., 4 I. C. C. Rep. 447, 502-6, (**122-A**), (reversed in Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (**122-D**), but not on this point).

Cosmopolitan Co. v. Hamburg Am. Co., 13 I. C. C. Rep. 266, (**608**).

Lykes S. S. Co. v. Commercial Union, 13 I. C. C. Rep. 310, (**615**).

This application of the Act does not render it unconstitutional as a burden on exports or as preferring the ports of one state to those of another.

Armour v. U. S., 153 Fed. 1, 13; 82 C. C. A. 135, (**476-A**); 209 U. S. 56, 79-80; 52 L. Ed. 428; 28 Sup. Ct. 428, (**476-B**).

See also infra, Chap. XIX, §§235-236.

eign countries and is not restricted to shipments to the boundary lines of such countries.[35] The word "adjacent" here means "contiguous," so as to permit substantial continuity of rails.[36]

42. Rail and Water Traffic.

As heretofore stated, the clause with reference to "common control, management or arrangement for continuous carriage or shipment" properly refers only to shipments partly by rail and partly by water.[37] In many cases, however, of all-rail shipments the Courts have defined what constitutes a "common arrangement." In most of these decisions no distinction has been made between the facts necessary to bring within the Act an all-rail shipment partly over an intra-state road, and those necessary in case of shipments partly by rail and partly by water. In other cases it has been intimated that a stricter test is to be applied to the latter.[38] It would, therefore, perhaps seem doubtful whether the "common arrangement" test, as laid down in the all-rail cases, would always be applied to a rail and water shipment.

The Commission has always held, both in cases of rail and water shipments and in those entirely by rail, that no express or formal arrangement is necessary to subject the traffic to the Act. In Phelps *v.* Texas & Pac. R. Co.,[39] a case involving a shipment by rail and water, Commissioner Knapp said:

"The receipt, forwarding and delivery of traffic by connecting carriers clearly establishes the existence of a common arrangement between the carriers for continuous carriage or shipment."

(35) Re Grand Trunk R. of Canada, 3 I. C. C. Rep. 89, (78).
See also Enterprise Mfg. Co. v. Georgia R. Co., 12 I. C. C. Rep. 451, (536), and cases cited.
As to the converse proposition see Spokane Merchants' Un. v. Northern Pac. R. Co., 5 I. C. C. Rep. 478, 502, (157).

(36) Lykes S. S. Co. v. Commercial Un. 13 I. C. C. Rep. 310, 315, (615).

(37) Supra, §§29-35.

(38) Ex Parte Koehler, 30 Fed. 867, 869-70, (1887).
Camden Iron Works v. U. S., 158 Fed. 561, 563-564, (449-B).
See also U. S. v. Colorado & N. W. R. Co., 157 Fed. 321, 342, (1907).

(39) 6 I. C. C. Rep. 36, 48.

In Tramwell *v.* Clyde S. S. Co.,[40] a case involving both all-rail, and water and rail traffic, Commissioner Veazey said:

"The receipt successively by two or more carriers for transportation of traffic under through bills for continuous carriage over their lines is assent to a common arrangement for such continuous carriage or shipment, and previous formal arrangement between them is not necessary to bring such transportation under the terms of the law."

Since the tendency of the Courts would appear to be to bring all traffic possible within the operation of the Act, it would seem probable that the Courts will continue to apply the test laid down in the Social Circle case to rail and water lines, even though a broader test is ultimately adopted to govern all-rail shipments.

The Commission has held that where a steamboat unites with a railroad in joint rates on particular traffic, it thereby subjects all its interstate traffic to the provisions of the Act.[41]

43. Wagon and Team Traffic.

Wagon and team traffic is not within the regulation of the Act, even where part of a continuous shipment with a railroad by teams controlled by the railroad.[42]

(40) 5 I. C. C. Rep. 324, 369, (**154**-A), (see supra, §37).

See also Re Joint Rail and Water Lines, 2 I. C. C. Rep. 645, (1889), and U. S. v. Wood, 145 Fed. 405, 411, (**423**).

Certain legal propositions in the latter opinion were reversed by the Circuit Court of Appeals in Camden Iron Works v. U. S., 158 Fed. 561, (**449**-B), a case involving the same facts.

(41) Admin. Rul. No. 66, (April 18th, 1908).

(42) Cary v. Eureka Springs R. Co., 7 I. C. C. Rep. 286, 310-311, (**235**).

Wylie v. N. P. R. Co., et al., 11 I. C. C. Rep. 145, (**388**).

Cf. Stone, et al., v. Detroit, G. H. & M. R. Co., 3 I. C. C. Rep. 613, (**100**-A).

Also Re Exchange of Free Trans., 12 I. C. C. Rep. 39, (**461**).

It would seem that a small service by wagon performed by the rail carrier would not exempt the traffic from the control of the Act, especially where this was a mere device covered by Sec. 7.

44. Carriers Subject to the Act[43]—Express Companies—Street Railways and Electric Railroads—Omnibus Companies—Stockyards Companies—Bridge Companies—Receivers.

The Commission is not concluded by the form of organization of corporations controlling interstate transportation, but looks to the substance of the relations between them. It has held that where a holding company controlled an extensive system of railroads including a terminal company operating wharves and docks, both the holding and terminal companies were proper parties to a proceeding to prevent a preference to a favored shipper by means of a lease to him by the terminal company, although neither, considered alone, came within the definition of a common carrier.[44]

Prior to the Amendment of 1906, the Act did not apply to express companies.[45] That Amendment, however, made such companies subject to the same extent as though named in the original Act.[46]

The Act applies to street railways[47] and to electric railroads.[48]

A company conveying passengers in carriages or omnibuses from a railroad station to points in the city is not subject to the Act. Such company may therefore give free passes on its busses, and its officers may not receive railroad passes.[49]

A stockyards company, not itself a carrier of live stock, is not responsible under the Act for the charges of railroads hauling

(43) As to Foreign Railroads, Water Lines and Wagon and Team traffic see supra, §§41, 42 and 43.
See also infra, §§301, 324, 339, 349.

(44) Eichenberg v. Southern Pac. R. Co., 14 I. C. C. Rep. 250, (**691**).

(45) Re Express Companies, 1 I. C. C. Rep. 349, (1887).
U. S. v. Morsman, 42 Fed. 448, (1890).
Southern Ind. Express Co. v. U. S. Express Co., 88 Fed. 659, (1898); 92 Fed. 1022; 35 C. C. A. 172, (1899).
See also Express Co. Cases, 117 U. S. 1; 29 L. Ed. 791; 6 Sup. Ct. 542, (1886).

(46) U. S. v. Wells Fargo Exp. Co., 161 Fed. 606, (**636**).

(47) Willson v. Rock Creek R. Co., 7 I. C. C. Rep. 83, 88, (**219**).

(48) Chicago & M. El. R. Co. v. Illinois Cent. R. Co., 13 I. C. C. Rep. 20, 27, (**563**).

(49) Re Exchange of Free Trans., 12 I. C. C. Rep. 39, (**461**).

live stock over its tracks into its yards, even though it be itself a carrier of dead freight.[50]

In an early case the Commission held that a bridge company, which owned a bridge and was engaged in transporting carloads of interstate freight across such bridge for a switching charge, was a common carrier within the meaning of paragraph 2 of Section 3 of the Act; but this decision was reversed by the Circuit Court.[51]

A receiver of a railroad company is a common carrier subject to the Act, and is responsible for the observance of its provisions,[52] and the assignee of a receiver who had been served with an order by the Commission against the receiver is bound thereby.[53]

The fact that a common carrier does some business other than

(50) Cattle Raisers' Ass'n. v. Fort W. & D. C. R. Co., 7 I. C. C. Rep. 513, 536, (**245**-A).

See also Cotting v. Kansas City Stk. Yds. Co., 82 Fed. 839, 850, (1897).

And cf. Heck v. East T., V. & G. R. Co., 1 I. C. C. Rep. 495, (**41**).

(51) Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 2 I. C. C. Rep. 162, (**57**-A); 37 Fed. 567; 2 L. R. A. 289, (**57**-B).

(52) Trammell v. Clyde S. S. Co., 5 I. C. C. Rep. 324, 331, (**154**-A).

Loud v. South Car. R. Co., 5 I. C. C. Rep. 529, 531, (**161**).

Troy Board of Trade v. Ala. Mid. Ry., 6 I. C. C. Rep. 1, 9, (**170**-A).

Indep. Ref. As. v. Western N. Y. & P. R. Co., 6 I. C. C. Rep. 378, 386; (137 Fed. 343, 358, 361; 203 U. S. 208), (**155**-C).

Evans v. Union Pac., 6 I. C. C. Rep. 520, 527, (**203**).

Cowan v. Bond, 39 Fed. 54, (**80**).

And see U. S. v. De Coursey, 82 Fed. 302, (**234**).

In the following cases instructions were given to receivers as to proper methods of operating under the Act.

Cutting v. Florida Ry. & Nav. Co., 30 Fed. 663, (1887).

Missouri Pac. R. Co. v. Texas & Pac. R. Co., 31 Fed. 862, (1887).

See also infra, §§301 and 324.

(53) Behlmer v. Louisville & N. R. Co., 71 Fed. 835, (**186**-B); 83 Fed. 898; 28 C. C. A. 229; 42 U. S. App. 581, (**186**-C). (reversed 175 U. S. 648, but not on this point).

See also I. C. C. v. Western N. Y. & P. R. Co., 82 Fed. 192, (**155**-D).

As to the responsibility of a lessor road for the rates of its lessee, see also, Western N. Y. & P. R. Co. v. Penn. Ref. Co., 137 Fed. 343, (**155**-E); 208 U. S. 208; 28 Sup. Ct. Rep. 268; 52 L. Ed. 493, (**155**-F).

the transportation of passengers and freight does not relieve it from the operation of the Act as regards such transportation.[54]

Many parties not carriers are criminally responsible for the illegal practices forbidden by the Act.[55] Thus it has been held that a car company, not itself a common carrier, violated Section 1 of the Elkins Act by giving premiums to shippers who used its cars.[56]

(54) Re Express Companies, 1 I. C. C. Rep. 349, (1887).

(55) See infra, Chap. XXVII, §349.

(56) I. C. C. v. Reichman, 145 Fed. 235, (421).

CHAPTER IV.

JUST AND REASONABLE CHARGES—KINDS OF RATES.[1]

45. Through and Local Rates and Shipments Distinguished.
46. Joint and Combination Rates.
47. Proportional Rates.

45. Through and Local Rates and Shipments Distinguished.[2]

The terms "through rate" and "through shipment" are used by the Commission and the Courts in several distinct connections. First, the term "through rates" is used with reference to rates to a distant point either over one road or over several roads jointly, as distinguished from the rates to or between intermediate points; second, it is used where the term "joint rates" might be a more exact term, to distinguish a rate between two points over two or more roads acting under a common arrangement for continuous carriage, from the combination rate made up of the sum of the local rates of several connecting roads acting under no such arrangement.[3]

Whether or not a given shipment is a through or a local one depends on the circumstances of the haul and not on what the carrier chooses to call it.[4] The essential feature of a through shipment is the presence of a contract for service through to destination.[5] The ultimate destination of the freight need not, however, be named at the point of shipment; if in the original contract of carriage it is provided that the commodity is to proceed beyond a designated point where a temporary stop is to be made, the haul

(1) The "rate" to which the Act applies is the net cost to the shipper of the service of transportation. I. C. C. v. Reichman, 145 Fed. 235, 238, (421).

(2) See Re Through Routes & Rates, 12 I. C. C. Rep. 163, (489), for a full discussion of the question of through rates.

(3) In Re Through Routes & Rates, 12 I. C. C. Rep. 163, 166, (489), Lane, C., defined a through route as "a continuous line of railway by an arrangement, express or implied, between connecting carriers."

(4) Lehmann v. Texas & Pac. R. Co., 5 I. C. C. Rep. 44, 54-5, (139).

(5) Re Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 240, 247, (231). See also Indiana R. Com. v. Kentucky & Ind. B. & R. Co., 14 I. C. C. Rep. 563, (1908).

beyond that point is part of the original through shipment and is not a new local one.[6] Rates providing for the milling of grain,[7] the "floating" of cotton[8] or the sawing of logs[9] in transit are properly through rates and the shipments through shipments. Where, however, the original contract provides only for a shipment to a given point, the mere intention of the shipper to send the freight on, either immediately or ultimately, does not make the reshipment part of the original transportation or entitle the shipper to have the freight taken at the balance of the through rate, although his intention to reship was known to the initial road.[10]

(6) Re Cotton Rates by K. C. M. & B. R. Co., 8 I. C. C. Rep. 121, 135-140, (261).

Central Y. P. Ass'n. v. Vicksburg S. & P. R. Co., 10 I. C. C. Rep. 193, 214, (344).

See also Re Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 240, 249, (231).

Re Mobile & O. R. Co., 9 I. C. C. Rep. 373, (312).

(7) Diamond Mills Co. v. Boston & M. R. Co., 9 I. C. C. Rep. 311, 316, (310).

See also Re Iowa Co., 1 I. C. C. Rep. 17, (4).

Re St. Louis Millers' Ass'n., 1 I. C. C. Rep. 20, (5).

Minneapolis Ch. of Com. v. Great Nor. R. Co., 5 I. C. C. Rep. 571, 591 (163).

Omaha Com. Cl. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 677, (212).

Listman Co. v. Chicago, M. & St. P. R. Co., 3 I. C. C. Rep. 47, (257).

Koch v. Penna. R. Co., 10 I. C. C. Rep. 675, (377).

St. Louis, H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 101, (384-A).

Quimby v. Maine Cent. R. Co., 13 I. C. C. Rep. 246, (605).

(8) Re Cotton Rates by K. C., M. & B. R. Co., 8 I. C. C. Rep. 121, (261).

Muskogee Com. Cl. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 312, (514).

(9) Central Yel. P. Ass'n. v. Vicksburg, S. & P. R. Co., 10 I. C. C. Rep. 193, 214, (344).

(10) Missouri, etc., Co. v. Cape G. & S. W. R. Co., 1 I. C. C. Rep. 30, (12).

Logan v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 604, 615-616, (75).

Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co., 3 I. C. C. Rep. 450, 462-463, (90).

Re Grain Rates of M. & O. R. Co., 9 I. C. C. Rep. 373, 380, (312).

In an early case the Commission held that where the original contract provided that the shipper might stop the shipment (cattle) at an intermediate point to try the market and at his option reship to points beyond, the reshipment was not a part of a through haul, there being no absolute contract for service beyond the point of stoppage.[11] From later decisions, however, it would seem that even this is now perhaps regarded by the Commission as a through shipment.[12]

In certain cases it has appeared that the carriers permitted grain which had already paid a local rate to be reshipped at the balance of the through rate. The legality of this practice has never been clearly settled, but the traffic would clearly seem not to be part of a through shipment.[13]

The Commission has stated that carriers are under special obligation to allow reasonable rates on local business,[14] and to give particular attention to making their local service efficient.[15]

46. Joint and Combination Rates.

"A joint rate is a rate over a through route, every part of which has been made by express agreement between the carriers making the through route." [16] There may be a through route without a joint rate applicable thereto. The through rate is in this case made up of the combined local charges of the connecting lines and is known as a combination rate.[17] Joint rates, except as pre-

(11) Chicago, R. I. & P. R. Co. & Chicago & A. R. Co., 3 I. C. C. Rep. 450, (**90**).

(12) Central Yellow Pine Ass'n. & Vicksburg, S. & P. R. Co., 10 I. C. C. Rep. 193, 213, 214, (**344**).

St. Louis, H. & G. R. Co. v. Illinois Cent. R. Co., 11 I. C. C. Rep. 486, (**410**).

St. Louis, H. & G. R. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 101, (384-A).

(13) See infra, §189, as to the legality of such rates.

(14) Lippman v. Illinois Cent. R. Co., 2 I. C. C. Rep. 584, 585, (**73**).

(15) Memphis Frt. Bur. v. Fort Smith & W. R. Co., 13 I. C. C. Rep. 1, 8, (**561**).

(16) Lane, C., in Re Through Routes & Rates, 12 I. C. C. Rep. 163, 165, (**489**).

See also Tar. Circ. 15-A, p. 5.

(17) Re Passenger Tariffs, 2 I. C. C. Rep. 649, (1889).

St. Louis H. & G. Co. v. Illinois Cent. R. Co., 11 I. C. C. Rep. 486, (**410**).

scribed by the Commission under the Hepburn Act,[18] depend entirely on the agreement of the connecting lines.[19]

A usual incident to a joint through rate is that each of the carriers, parties to it, accepts as its division of the through rate a less amount than its local rate for the same distance over its line. This is not essential, however, and an agreed through rate over connecting lines is none the less a joint rate though one of the carriers receives its local rate as its division.[20]

In an early Federal case it was stated that a total rate between two points over two or more lines is presumed to be merely a combination of local rates, in the absence of averments or proof that it is a joint rate.[21]

In a recent decision the Commission held that joint rates can be formed only between carriers subject to the Act and that there cannot be a joint rate, within the meaning of the Act, between a railroad and an ocean steamship line or a teamster.[22]

47. Proportional Rates.

There would also seem to be a third species of rate, which is neither a joint rate nor strictly a combination rate. This is what is called a proportional rate. It is a certain fixed sum, less than the

(18) See infra, §§275-279.

(19) Application of F. W. Clark, 3 I. C. C. Rep. 649, (1890).
Lehman v. Texas & P. R. Co., 5 I. C. C. Rep. 44, 50-55. (**139**).
New York, N. H. & H. R. Co. v. Platt, 7 I. C. C. Rep. 323, (**236**), (compare Re Form, etc., of Rate Schedules, 6 I. C. C. Rep. 267, 272, (1894).
Diamond Mills v. Boston & M. R. Co., 9 I. C. C. Rep. 311, (**310**), and cases cited.
See also Chap. XVIII, §§211, 221, etc.; Chap. XXIV, §§275, 279.

(20) Milwaukee Ch. of Com. v. Flint & P. M. R. Co., 2 I. C. C. Rep. 553, 568, (**71**).
See also James & Mayer Buggy Co. v. Cincinnati, N. O. & T. P. R. Co., 4 I. C. C. Rep. 744, (**132-A**).
Calloway v. Louisville & N. R. Co., 7 I. C. C. Rep. 431, 455, (**242-A**).
St. Louis & S. F. R. Co.'s Case, 8 I. C. C. Rep. 290, 301-303, (**267**).
Re Through Routes & Rates, 12 I. C. C. Rep. 163, (**489**).
And infra, §207.

(21) U. S. v. Mellen, 53 Fed. 229, (**158**).
This decision is of doubtful authority; see infra, §186.

(22) Cosmopolitan Co. v. Hamburg Am. Co., 13 I. C. C. Rep, 266, 280, (**608**).

regular local rate, charged for a haul to or from a junction point with a connecting line on traffic destined to or coming from points on other lines with which the road prescribing the proportional rate has no joint through rate agreement. The total rate to the point of destination is thus made by adding the proportional rate to the local rates of the connecting lines, and the whole may be called a "combination through rate."[23] The Commission, in a case decided in 1897, expressly held that such proportional rates, less than the regular locals, were illegal.[24] That decision would seem, however, to be in conflict with a decision by the Supreme Court.[25] Similar proportional rates have since often been referred to by the Commission without comment and it is believed that if the question were again presented the Commission would no longer adhere to its original view.[26]

(23) Clements, C., dissenting, in New York, N. H. & H. R. Co. v. Platt, 7 I. C. C. Rep. 323, 344, (236).

(24) New York, N. H. & H. R. Co. v. Platt, 7 I. C. C. Rep. 323, (236).

(25) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

See infra, §§146 and 187.

(26) See infra, §188 as to the legality of proportional rates.

CHAPTER V.

JUST AND REASONABLE CHARGES—WHAT ARE REASONABLE RATES.

48. Provisions of the Act.
49. Reasonableness per se Distinguished from Relative Reasonableness.
50. Questions of Reasonableness Distinguished from those Involving Preferences and Discriminations.
51. Application of Law of Supply and Demand to Railroad Rates.
52. Circumstances Properly Considered by Carrier in Adjusting Rates—Cost and Value of Service.
53. Same Subject — Exceptional Instances in which Rates have been Based on Cost of Service alone—Demurrage Charges.
54. Same Subject—Early Attitude of the Commission to Ignore Value of Service.

48. Provisions of the Act.

The third paragraph of Section 1 of the Act is as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

49. Reasonableness per se Distinguished from Relative Reasonableness.

In opinions of the Courts and of the Commission, allusions are frequently made to the *reasonableness per se* of a given rate, as distinguished from its *relative reasonableness*. A rate is said to be reasonable *per se* when it yields no more than a reasonable return to the carrier for the service rendered; it is relatively reasonable when it is properly adjusted to other rates. Under the Interstate Commerce Act it is not sufficient that a rate be not extortionate; it must also be relatively fair and just with reference to other rates.[1]

(1) Farmington B'd. of Tr. v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep. 215, 221, (29).
Detroit B'd. of Tr. v. Grand Tr. R. Co., 2 I. C. C. Rep. 315, 322, (62).
Lynchburg B'd. of Tr. v. Old Dominion S. S. Co., 6 I. C. C. Rep. 632, 645-6, (211).

It is practically impossible to determine the reasonableness of a specific rate judged solely by its return to the carrier,[2] for the various items of expense attributable to the carriage of a given commodity are so complex that they cannot possibly be calculated with exactness. Thus, the statistician of the Pennsylvania Railroad could only guess how much of the expense of maintaining the roadbed or what proportion of the interest on the bond issue should be properly charged against the carriage of horses from Chicago to Philadelphia, and how much against the passenger traffic from Altoona to Harrisburg. Indeed the Commission has itself recognized that accurate apportionment of expenses cannot be

Glade Coal Co. v. Baltimore & O. R. Co., 10 I. C. C. Rep. 226, 244, (347).

Banner Milling Co. v. New York Cent. & H. R. R. Co., 13 I. C. C. Rep. 31, 34, (567).

In Re Chicago, St. P. & K. C. R. Co., 2 I. C. C. Rep. 231, 265, (58), Chairman Cooley said:

"The Commission is of the opinion that the phrase, 'rates reasonable in and of themselves,' which is often made use of in similar cases to the present, is very likely to be misleading. It is a phrase which seems to imply that the particular rates may be considered by themselves as if they were and could be affected by no others; . . . . But it is not the theory of the Act to regulate commerce that the reasonableness of rates can thus be separately and independently determined. On the contrary, it is assumed in the Act that persons, corporations, and localities are interested not only in the rates charged to them, but in the rates which are charged to others also; and while the Act does not require all rates to be proportional, it nevertheless makes the element of proportion an important one when the rates for any locality are to be determined. No rates can, therefore, be reasonable in and of themselves within the contemplation of the Act which are made regardless of proportion."

This dictum has been quoted by the Commission in a later case (Marten v. Louisville & N. R. Co., 9 I. C. C. Rep. 581, 599), (325). It is believed that it does not perhaps bring out as clearly as it might the distinction hereafter explained, between questions of reasonableness and those involving discrimination or preference.

Compare also Cattle Raisers' Ass'n. v. Fort W. & D. C. R. Co., 7 I. C. C. Rep. 555k, (245-A).

Lehmann v. Atchison, T. & S. F. R. Co., 10 I. C. C. Rep. 460, 471, (366).

Murray v. Chicago & N. W. R. Co., 62 Fed. 24, (1894); 92 Fed. 868; 35 C. C. A. 62, (1899).

U. S. v. Chicago & A. R. Co,, 148 Fed. 646, 648, (430-A).

In the case last cited the Court said, "No rate can possibly be reasonable that is higher than anybody else has to pay."

The Supreme Court has several times called attention to the failure on

made even as between freight and passenger traffic,[3] a much more simple problem than that of isolating the charges against a single commodity. In determining the reasonableness of a given rate, the Commission and the Courts are thus driven to rely almost entirely on a comparison of the rate in question with other rates on the same or on other commodities.[4]

50. Questions of Reasonableness Distinguished from Those Involving Preferences and Discriminations.

Where the rates used as a basis of comparison are on commodities in competition with that under consideration, the question of discrimination necessarily presents itself. The provisions of the Act make the rates on such commodities an absolute standard to which, with proper regard to similarity of circumstances and conditions, the disputed rate must be adjusted. Where, however, the rates used for comparison are on non-competitive articles, no question of preference or of discrimination is presented; the rate used as a basis of comparison is not an absolute standard, but merely an aid to determine the reasonableness of that under consideration. A rate on live cattle so low as to net the carrier a loss would violate the Act if dressed beef were carried for one-half that rate; such a rate would not, however, be rendered illegal merely by the fact that cotton was carried over the same line for practically nothing. But where it appears that the rate under consideration is out of all proportion to other rates over the

the part of the Commission to draw an accurate distinction between questions of reasonableness and those of discrimination and preference.

East T., V. & G. R. Co. v. I. C. C. Rep., 181 U. S. 1, 23; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D).

I. C. C. v. Louisville & N. R. Co., 190 U. S. 273, 284; 23 Sup. Ct. 687; 47 L. Ed. 1047, (**242**-C).

Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 217-8; 28 Sup. Ct. 268; 52 L. Ed. 493, (**155**-F).

(2) Central Yel. P. Ass'n. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 538, (**369**-A).

(3) Cattle Raisers' Ass'n. v. Missouri, K. & T. R. Co., 11 I. C. C. Rep. 296, 331, (**399**-A); 13 I. C. C. Rep. 418, 425, (**399**-C).

Compare I. C. C. v. Lehigh Valley R. Co., 74 Fed. 784, 787, (**124**-B). where the method adopted of computing the cost of service over a given branch was held to be too unreliable to form a basis for decision.

(4) See Harlan, C., in Frye v. Northern Pac. R. Co., 13 I. C. C. Rep. 501, 507-8, (**635**), quoted infra, §80.

same or other lines, this is cogent evidence that the railroad is receiving more than a reasonable return for the transportation.

There are, therefore, two ways in which a rate may be said to be relatively unreasonable: first, where a less rate is charged on a competitive commodity, producing an undue discrimination, and second, where it is out of proportion to other rates on non-competitive articles. The first case does not properly come under Section 1 of the Act, but under Sections 2 and 3; the second is really a case of inherent reasonableness, this reasonableness being determined, as it were, by circumstantial evidence, instead of by a direct calculation of the actual return to the carrier from hauling the traffic.

The Courts and the Commission have used the expressions "reasonable *per se*" and "relatively reasonable" without an entirely clear explanation of what was meant by these terms.[5] It is believed, however, that it is highly important that the distinctions to which attention has just been called should be borne in mind, in connection with any discussion of the reasonableness of rates.

51. Application of Law of Supply and Demand to Railroad Rates.

The Commission has said, on a number of occasions, that transportation by a common carrier is a service of a quasi-public character, not to be sold to the highest bidder, and not subject to the Law of Supply and Demand.[6] Unless explained, this statement may perhaps be misleading. The duty of the common carrier toward the public is certainly very different from that of the ordinary

(5) See supra, §49, n.(1).

(6) Myer v. Cleveland, C. C. & St. L. R. Co., 9 I. C. C. Rep. 78, 83, (296).

Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 386, 405, (313).

Central Yellow Pine Ass'n. v. Illinois Central R. Co., 10 I. C. C. Rep. 505, 536, (369-A).

Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 582, (370).

Tift v. Southern Ry. Co., 138 Fed. 753, (319-B).

Missouri, K. & T. Railway Co.'s Rates, 11 I. C. C. Rep. 238, 271, (397).

And cf. Thompson Lumber Co. v. Illinois Cent. R. Co., 13 I. C. C. Rep. 657, 666, (658).

Oregon & W. Co. v. Union Pac. R. Co., 14 I. C. C. Rep. 1, 8, (661).

merchant.[7] In return for the extraordinary powers granted and in consideration of the practical monopoly acquired, the common carrier is required to charge reasonable rates and to treat all shippers alike. He cannot, like the merchant, charge what he can get for his transportation. It is not true, however, that the Law of Supply and Demand plays no part at all in adjusting transportation charges, or that in fixing rates no weight is to be given to the consideration of what rate the traffic will bear.[8] Both of these principles enter into the regulation of rates, but neither of them is allowed the full sway permitted in mercantile transactions of a purely private nature.

Rates are not adjusted solely on the basis of Cost of Service to the Carrier. The railroads are entitled to consider also the Value of the Service to the Shipper. They are not permitted, however, to charge an exorbitant rate simply because a shipper can afford to pay such a rate and cannot get his goods to market except over the road in question.

52. Circumstances Properly Considered by Carrier in Adjusting Rates[9]—Cost and Value of Service.

The Commission and the Courts have made a number of general statements as to the various circumstances which properly enter into the adjustment of rates.[10] On analysis it will be found,

(7) See U. S. v. Trans-Missouri Freight Ass'n. 166 U. S. 290, 320-322, 332-333; 17 Sup. Ct. 540; 41 L. Ed. 1007, (1897).

New York Prod. Ex. v. Baltimore & O. R. Co., 7 I. C. C. Rep. 612, 661, (252).

(8) See I. C. C. v. Chicago, G. W. R. Co., 141 Fed. 1003, 1008, 1015, (364-B).

(9) In the ensuing discussion many principles are referred to and authorities cited which bear primarily on the question of discrimination. Problems of reasonableness and of discrimination and preference are so interwoven in the decided cases that there is scarcely a decision on one point which does not also bear on the other.

(10) Ist Ann. Rep. 1 I. C. C. Rep. 317-322.

Evans v. Oregon R. & N. Co., 1 I. C. C. Rep. 325, (32).

Boston Ch. of Com. v. Lake S. & M. S. R. Co., 1 I. C. C. Rep. 436, 452, (38).

Howell v. New York, L. E. & W. R. Co., 2 I. C. C. Rep. 272, 282-5, (59).

Delaware, St. Gr. v. New York, P. & N. R. Co., 4 I. C. C. Rep. 588, 602, (125).

however, that all these circumstances fall within one or both of the two main considerations heretofore referred to,—the Cost of the Service to the Carrier and the Value of the Service to the Shipper.[11] Neither of these considerations is a proper test by itself; both should be considered together.[12] Practically all the cases in which the reasonableness of a given rate must be passed on by the Commission or by the Courts, are cases in which it is necessary to come to some equitable compromise between these two conflicting considerations, the shipper alleging that the rate in question is so high as to deprive him of profit, and the carrier contending that, if reduced, it will deprive the stockholders of a reasonable return on their investment. A rate must be considered from both points of view. The carrier cannot charge exorbitant rates though the traffic will stand such rates; nor can it be required to haul goods at a loss merely because the traffic will not bear remunerative rates.[13] Within these two extremes, however,

Buchanan v. Northern Pac. R. Co., 5 I. C. C. Rep. 7, 11, (**136**).

Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 515, (**201**-A).

I. C. C. v. Chicago, G. W. R. Co., 141 Fed. 1003, 1015, (**364**-B).

(11) The Courts have also stated that the "general public interest" must be considered, but this would seem to mean merely the combined interest of the stockholders of the railroad and that of the persons who ultimately pay the rate.

See I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, 624, (**275**-B).

I. C. C. v. Chicago, G. W. R. Co., 141 Fed. 1003, 1015, (**364**-B).

In I. C. C. v. Louisville, N. & R. Co., 73 Fed. 409, 419, (**156**-B), Judge Clark said :

"It must be kept in mind, too, that the carriers' business of transporting goods involves the rights of, and the necessity of doing justice to three parties. The interest of the seller at the point of departure, the rights of the carrier, and the rights or interest of the trader or consumer at the point of delivery, are all concerned in a given transaction, and must be duly considered by a tribunal or court in the decision of any case involving the carrier's freight traffic."

(12) I. C. C. v. Delaware, L. & W. R. Co., 64 Fed. 723, 724, (No. 2), (**180**-B).

(13) Delaware, St. Gr. v. New York, P. & N. R. Co., 4 I. C. C. Rep. 588, 606, (**125**).

Re Food Product Rates, 4 I. C. C. Rep. 48, 66-7, (**106**).

Grain Shippers' Ass'n. v. Illinois Cent. R. Co., 8 I. C. C. Rep. 158, 176-7, (**263**).

the Law of Supply and Demand plays a most important part. The interest of the shipper and consumer in having the traffic moved must be considered as well as the cost of the service to the railroad,[14] but in a consideration of the result of the business to the shipper, the fact that the carrier is entitled to a reasonable return for the service rendered must not be lost sight of.[15]

53. Same Subject—Exceptional Instances in Which Rates Have been Based on Cost of Service Alone—Demurrage Charges.

Although both cost and value of service enter into the determination of practically all rates, in some few instances rates have been adjusted on the basis of cost of service alone. This was done in a case involving the proper relation of rates between hogs and cattle and the products thereof,[16] and in certain cases involving incidental charges for refrigeration[17] and for switching.[18]

(14) Boston Ch. of Com. v. Lake S. & M. S. R. Co., 1 I. C. C. Rep. 436, 454, (38).

Thurber v. New York C. R. Co., 3 I. C. C. Rep. 473, 499, (92).

Re Food Product Rates, 4 I. C. C. Rep. 48, 74, (106).

Rice v. Western N. Y. & Penna. R. Co., 4 I. C. C. Rep. 131, 140, (111).

Planters' Compress Co. v. Cleveland C. C. & St. L. R. Co., 11 I. C. C. Rep. 382, 405, 406, (402).

Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 585, (370).

I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1015, (364-B).

(15) Re Food Product Rates, 4 I. C. C. Rep. 48, 66-67, (106).

Loud v. South Car. Co., 5 I. C. C. Rep. 529, 543, (161).

(16) Squire v. Michigan Cent. R. Co., 4 I. C. C. Rep. 611, (126).

A decision of this kind, of course, ignores the influence of market competition. Under later decisions by the Supreme Court the carriers would be entitled so to adjust rates on competitive commodities as to equalize advantages of the different shippers in disposing of their products at the point of destination.

See infra, §§77-79, 199 et seq.

(17) Re Transportation of Fruit, 10 I. C. C. Rep. 360, (357-A); 11 I. C. C. Rep. 129, (357-B).

Cf. Waxelbaum v. Atlantic, C. L., 12 I. C. C. Rep. 178, (492).

(18) St. Louis H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 102, (384-A); (149 Fed. 609), (384-B).

Cf. also Cattle Raisers' Asso. v. Fort Worth & D. C. R. Co., 7 I. C. C. Rep. 513, 555a, (245-A); 10 I. C. C. Rep. 83, (245-F); 11 I. C. C. Rep. 277, 296, (245-G); as regards the $2.00 switching charge into Chicago; also (399-A-F).

In the cases cited in the three foregoing notes, the reasonableness of

The element of the Value of the Service would seem to have been ignored in another class of cases, where the Commission has held that a difference in rates may not properly be based on the use to which the article shipped is to be put.[19]

A demurrage charge has been held to be in the nature of a penalty, the purpose of which is to prevent terminal facilities from becoming congested, and hence may properly be fixed at a figure largely exceeding the rental value of the car.[20]

54. Same Subject—Early Attitude of the Commission to Ignore Value of Service.

During the first years after its organization, the Commission failed to give sufficient weight to the element of the value of the service, resulting in the reversal by the Courts of many of the Commission's decisions.[21]

the charge was determined by the actual cost of the transportation service alone, exclusive of interest on fixed charges. About 33 per cent. of an ordinary rate, however, is usually allowed for fixed charges.

(19) Stowe-Fuller Co. v. Penna. R. Co., 12 I. C. C. Rep. 215, 219, (499).

Fort Sm. Tr. Bur. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 651, (657).

And cf. Capital City Co. v. Central Vt. R. Co., 11 I. C. C. Rep. 104, (385).

National Mach. Co. v. Pittsburg C. C. & St. L. R. Co., 11 I. C. C. Rep. 581, 584, (422).

In the case first cited, Lane, C., said:

"We cannot regard a classification as scientific or a difference in rates as well based which is altogether founded upon a distinction that has no transportation significance."

See also Admin. Rul. No. 34.

Cf. Admin. Rul. No. 2.

Also infra, §108.

(20) Kehoe v. Charleston & N. C. R. Co., 11 I. C. C. Rep. 166, (391).

See also infra, §115.

(21) See infra, §§77-79, 199 et seq.

CHAPTER VI.

JUST AND REASONABLE CHARGES—CIRCUMSTANCES PROPERLY CONSIDERED BY CARRIERS IN FIXING RATES—COST OF SERVICE TO THE CARRIER.

55. Difference in Problem of Determining Reasonableness of Rate Schedules and of Specific Rates.
56. The Carrier Entitled to Fair Return on the Value of that Employed for the Public Convenience.
57. Proper Method of Computing Such Value.
58. Distance—An Important but not always a Controlling Factor.
59. Distance—Grouping System of Rate-Making.
60. Distance—Group Rates Justified by Commercial or Market Competition.
61. Distance—Group Rates Tested by Average Distance—Short Line Distance the Proper Test.
62. Distance — Ton-Mile Rate Should Decrease as Length of Haul Increases.
63. Consistency of Commodity Shipped and Method of Shipment.
64. Car Supply.
65. Volume of Traffic and Amount of Shipment—Rates Should Ordinarily Decrease as Tonnage Increases.
66. Same Subject — Wholesale Principle not Generally Applicable to Freight Rates.
67. Same Subject—Exceptions.
68. Same Subject—Summary of Decisions.
69. Nature of the Service.
70. Rates over Branch Lines and Narrow Gauge Roads.
71. Indirect Advantages to the Carrier.
72. Miscellaneous Circumstances Affecting Cost of Service—Bridge Charges—Special Facilities, etc.

55. Difference in Problem of Determining Reasonableness of Rate Schedules and of Specific Rates.

There are two classes of cases in which, from the standpoint of the carrier, the reasonableness of rates has been investigated by the Courts. The first is where the question concerns the propriety of a given rate on a specific commodity, and the second where it concerns the reasonableness of an entire schedule of rates, prescribed by a State Legislature or Commission. In the latter cases the amount of return to the carrier under the schedule in question may be determined with reasonable accuracy by subtracting

the total expenses from the total receipts, but, when the question concerns a rate on a specific article this is impossible, and in investigations of rates under the Interstate Commerce Act the Commission and the Courts proceed almost entirely on their experience in such matters, aided by a comparison with rates on similar commodities.[1]

It is not here proposed to attempt to cite or comment on the many cases involving the propriety of schedules prescribed by State Commissions and contested by the carrier on the ground that their observance will amount to a confiscation of its property.[2] Nor is it deemed worth while to devote much space to reviewing the various attempts in reported cases to calculate in dollars and cents the net return to a carrier from the whole or a part of its traffic. It would seem sufficient for our purpose to give a brief outline of the elements properly entering into the cost of transportation, as these are emphasized in cases arising under the Interstate Commerce Act.

56. The Carrier Entitled to Fair Return on the Value of that Employed for the Public Convenience.

"A reasonable rate is one that will make just and fair return to the carrier when it is charged to all who are to pay it without unjust discrimination against any, and when the revenue it produces is subject to no improper reductions." [3]

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." [4]

In computing the value of the property employed for the public convenience, there is to be taken into consideration "the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the

(1) See supra, §49.

Also Harlan, C., in Frye v. Northern Pac. R. Co., 13 I. C. C. Rep. 501, 507-8, (635), (quoted infra, §80).

(2) The leading case is Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. Ed. 819, (1898).

All the later cases cite this decision and hence may easily be found by means of Sheppard's Annotations.

(3) 4th Annual Report of the Commission, 4 I. C. C. Rep. 363.

(4) Smyth v. Ames, 169 U. S. 466, 547; 18 Sup. Ct. Rep. 418; 42 L. Ed. 819, (1898).

Brabham v. Atlantic C. L., 11 I. C. C. Rep. 464, 473, (407).

present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute and the sum required to meet operating expenses." [5]

57. Proper Method of Computing Such Value.

The test is not the amount spent by the railroad, but the value of that used for the public benefit. Extravagant management is therefore no excuse for high rates [6] and the purchase or rental price of a line is not a proper criterion of the amount of return it should produce.[7]

In computing the cost of the service to the carrier, care must be taken to separate fixed charges from cost of operation. Permanent improvements are not properly charged as part of the annual operating expenses.[8]

(5) Prouty, C., in Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 404, (313), quoting from the opinion of the Supreme Court in Smyth v. Ames, supra.

(6) Shamberg v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 630, 660, (127).

Milk Prod. Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 164, (220).

Grain Shippers' Asso. v. Illinois Cent. R. Co., 8 I. C. C. Rep. 158, 182-183, (263).

Danville v. Southern R. Co., 8 I. C. C. Rep. 571, 583, (277-B).

Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 403, (313).

See also New Orleans Cot. Ex. v. Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. Rep. 375, 388, (66).

Missouri, K. & T. R. Co. v. I. C. C., 164 Fed. 645, (399-E).

(7) Newland v. Northern Pac. R. Co., 6 I. C. C. Rep. 131, 146, (179).

See also Kindel v. Adams Exp. Co., 13 I. C. C. Rep. 475, 490, et seq. (634).

And cf. Reynolds v. Southern Express Co., 13 I. C. C. Rep. 536, 539, (640).

Also Society Am. Fl. v. United States Ex. Co., 12 I. C. C. Rep. 120, 126, (479).

(8) Central Yel. P. Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 544, (369-A).

Cattle Raisers' Asso. v. Missouri, K. & T. R. Co., 13 I. C. C. Rep. 418, 432, (399-C).

Illinois Cent. R. Co. v. I. C. C., 206 U. S. 441, 461; 51 L. Ed. 1128; 27 Sup. Ct. Rep. 700, (369-B).

But cf. Southern Pac. R. Co. v. Board of R. Com'r's., 78 Fed. 236, 265, (1896).

When a rate yields a reasonable return on capital invested, the railroads are not justified in increasing it merely because additional revenue is needed.[9]

Although increased expenses to the railroad justify an advance in rates,[10] this advance should be made on the entire traffic and the burden of it should not be placed entirely on one or on a few commodities.[11]

On a new railroad liberal rates are allowed until earnings are sufficiently large to yield a fair return on the actual expenditure.[12]

The following are the principal items of operating expenses which have been emphasized by the Commission as properly influencing the fixing of rates of carriers.

58. Distance—An Important but not Always a Controlling Factor.

An obvious method of fixing rates would, of course, be to construct all tariffs on a mileage basis, but this method, although possessing the advantage of simplicity, has always been considered entirely impracticable as applied to railroads in the United States, because of the varying conditions in different parts of the country. To have adopted it in this country would undoubtedly have prevented the wonderful development of the West, which was made possible only by the enterprise and co-operation of the railroads in allowing very low rates on long hauls of staple commodities. It is the method always favored by the established producer as against the pioneer in newly developed districts. As an economic proposition, to prevent the carriers from annihilating distance, and

(9) Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 585, (**370**).

(10) Cattle Raisers' Asso. v. Missouri, K. & T. R. Co., 13 I. C. C. Rep. 418, 430, (**399-C**).

(11) Hill Cotton Co. v. Missouri, K. & T. R. Co., 6 I. C. C. Rep. 601, 620, (**210**).

National Hay Asso. v. Lake Sh. & M. S. R. Co., 9 I. C. C. Rep. 264, 304, (**309-A**).

(12) Newland v. Northern Pac. R. Co., 6 I. C. C. Rep. 131, 146, (**179**).

Hill Cotton Co. v. Missouri, K. & T. R. Co., 6 I. C. C. Rep. 601, 622, (**210**).

Arkansas R. Com. v. St. Louis & N. A. R. Co., 12 I. C. C. Rep. 233, (**503**).

Memphis Fr. Bur. v. Fort Sm. & W. R. Co., 13 I. C. C. Rep. 1, 9, (**561**).

But see Cary v. Eureka Sp. R. Co., 7 I. C. C. Rep. 286, 316, (**235**).

from putting the distant producer on a plane with his more favorably situated rival, would appear to be analogous to the prohibition of the introduction of machinery because of the consequent hardship to skilled hand labor which would result.[13]

The Commission has always recognized distance, however, as a most important consideration in rate making and has said that, as a general rule, other things being equal, distance should be a controlling factor, and rates between distant points should exceed those between points less distant.[14] Distance, however, has never been regarded as the sole consideration. As said by Commissioner Prouty,[15] "Rates cannot be made with a yard stick." Where, therefore, other circumstances are present which outweigh the importance of the length of the haul, either as affecting the cost or the value of the service, it has held that distance may properly be disregarded.[16]

(13) The stagnation to business and commerce resulting from the adoption of the mileage system on continental railroads, is forcibly presented in Mr. Hugo Meyer's interesting book on "Governmental Regulation of Railroad Rates."

(14) Eau Claire Board of Tr. v. Chicago M. & St. P. R. Co., 5 I. C. C. Rep. 264, 290, (**151**).

Hill v. Nashville C. & St. L. R. Co., 6 I. C. C. Rep. 343, 358, (**197**).

Cordele Machine Shop v. Louisville & N. R. Co., 6 I. C. C. Rep. 361, 371, (**198**).

Omaha Com. Club v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 674, (**212**).

Milk Prod. Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 164-165, (**220**).

Cincinnati Freight Bur. v. Cincinnati N. O. & T. P. R. Co., 7 I. C. C. Rep. 180, 191, (**221**).

Southern Groc. Co. v. Georgia Nor. R. Co., 12 I. C. C. Rep. 229, (**502**).

(15) Kindel v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 603, 628, (**288**).

See also Kansas Bd. of R. Comm'rs. v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 304, 307, (**268**).

Wilhoit v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 138, 140, (**482**).

I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 424, (**156-B**).

(16) Savannah Bur. v. Charleston & S. R. Co., 7 I. C. C. Rep. 458, 474, (**243**).

New York Prod. Ex. v. Baltimore & O. R. Co., 7 I. C. C. Rep. 612, 667, (**252**).

Since the recognition of market competition as a justification for pref-

59. Distance—Grouping System of Rate Making.

In many parts of the country all shipping points situated in a more or less extensive area are placed, for the purpose of rate making, in so-called "rate-groups," and a blanket rate applied to all, although some are more distant than others. In passing on the legality of rates so constructed, as creating an undue preference in favor of the more distant points, the importance of the element of distance has frequently been considered by the Courts and by the Commission. On a number of occasions the Commission has said that it does not regard group rates as necessarily illegal simply because the same rate is allowed more distant points or because the element of distance is disregarded, and that the grouping system "becomes illegal only when it is shown that illegal results flow from it." [17]

The meaning of this general statement appears from other decisions. In certain sections of the country, where peculiar conditions affect the traffic, the grouping system is the most equitable as well as the most practicable method of constructing rates. Thus, all the mines in a certain district or all the wheat growers in a given wheat-belt demand the same rate to market, and to allow such a rate stimulates expansion of the industry. The Commission recognizes that this system has been in force throughout the history of railroading, and although a certain amount of hard-

erences among localities (see infra, Chap. VII, §§76-78, and Chap. XVII §199 et seq.), the element of distance is of little practical importance in such cases. It is still important, however, in cases under Section 1. Thus it seldom happens that a rate to a distant locality can be held to constitute an undue preference of such locality over one less distant because the latter is required to pay the same or a higher rate; but it very often happens that a rate is declared unreasonable on comparison with less rates to more distant points.

(17) La Crosse v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep, 629, 631, (45).

Howell v. New York, L. E. & W. R. Co., 2 I. C. C. Rep. 272, 294, (59).

Bovaird Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 56, 66, (576).

See also Desel Co. v. Kansas City S. R. Co., 12 I. C. C. Rep. 220, (500).

ship is bound to result from it,[18] the Commission is not disposed to interfere except in extreme cases. [19]

There may properly be different groupings for different commodities, the groups being so arranged that the regions of production of the same article are grouped together.[20]

60. Distance—Group Rates Justified by Commercial or Market Competition.

The legality of group rates has been approved by the Commission in a number of cases.[21] In other cases, however, where the difference in transportation expenses over the various parts of the group was so exceptionally broad that the Commission considered it unfair that the nearer points be deprived of the "geographical advantages" to which it considered them naturally en-

(18) Desel-Boettcher Co. v. Kansas City So. R. Co., 12 I. C. C. Rep. 220, 222, (**500**).

Mitchell v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 324, 325, (**516**).

Rhinelander Co. v. Northern Pac. R. Co., 13 I. C. C. Rep. 633, 636, (**654**).

(19) See also Eau Claire Bd. of Tr. v. Chicago, M. & St. P. R. Co., 5 I. C. C. Rep. 264, 290, (**151**).

Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, (**291**).

Southern Groc. Co. v. Georgia Nor. R. Co., 12 I. C. C. Rep. 229, (**502**).

(20) Desel Co. v. Kansas City So. R. Co., 12 I. C. C. Rep. 220, (**500**).

(21) Howell v. New York, L. E. & W. R. Co., 2 I. C. C. Rep. 272, 288, (**59**), (but see Milk Prod. Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, (**220**), Brockway v. Ulster & D. R. Co., 8 I. C. C. Rep. 21), (**255**).

Rend v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 540, (**69**).

Lippman v. Illinois C. R. Co., 2 I. C. C. Rep. 584, 586, (**73**).

Imperial Coal Co. v. Pittsburg & L. E. R. Co., 2 I. C. C. Rep. 618, (**76**), (but see page 641).

Coxe Bros. v. Lehigh Val. R. Co., 4 I. C. C. Rep. 535, 586, (**124-A**).

Lehmann, Higginson & Co. v. Texas & Pac. R. Co., 5 I. C. C. Rep. 44, (**139**).

Phillips Bailey & Co. v. Louisville & N. R. Co., 8 I. C. C. Rep. 93, 106, (**259**).

Kindel v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 608, 628, (**288**).

St. Louis Bus. Men's League v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 318, (**311**).

titled, it has refused to sanction the blanket rates in force.[22] Most of the latter cases antedate the decisions by the Supreme Court holding that market or commercial competition justifies a rate preference between localities.[23] Under these decisions a carrier is clearly entitled to charge the same rate to two points not equally distant, provided the rate to the near point is not unreasonable *per se,* and the rate to the distant locality is not less than the cost of transportation, and is necessary to enable the shipper to market his commodity. Decisions by the Commission prior to 1900, involving questions of preferences among localities, were rendered under a misinterpretation of the Act in this particular, and it is believed that there are very few group rates which would not receive the sanction of the Supreme Court at the present time.

61. Distance—Group Rates Tested by Average Distance—Short Line Distance the Proper Test.

Where a blanket or group rate is complained of as unreasonable in itself, and not as an undue preference of shippers at the far end of the group, the reasonableness of the rate as a whole is tested by the charge to or from a point in the middle of the group and not by one at the far end.[24]

In computing distance, short line distance is the proper test and

(22) Spokane Mer. Un. v. Northern Pac. R. Co., 5 I. C. C. Rep. 478, 505, 506, (**157**).

Minneapolis Ch. of Com. v. Great Northern R. Co., 5 I. C. C. Rep. 571, (**163**).

Newland v. Northern Pac. R. Co., 6 I. C. C. Rep. 131, 145, (**179**).

Evans v. Union Pac. R. Co., 6 I. C. C. Rep. 520, 547, (**203**).

Omaha Com. Club v. Chicago, R. I. & Pac. R. Co., 6 I. C. C. Rep. 647, 680, (**212**).

Rea v. Mobile & Ohio R. Co., 7 I. C. C. Rep. 43, (**216**).

Milk Prod. Asso. v. Del. L. & W. R. Co., 7 I. C. C. Rep. 92, (**220**).

Nebraska R. Com. v. Union Pac. R. Co., 13 I. C. C. Rep. 349, 355-356, (**619**).

Corn Belt Asso. v. Chicago B. & Q. R. Co., 14 I. C. C. Rep. 376, 396, (**704**).

(23) See infra, Chap. VII, §§77-79, and Chap. XVII, §199 et seq.

(24) Coxe Bros. v. Lehigh V. R. Co., 4 I. C. C. Rep. 535, 586, (**124-A**).

Delaware St. Gr. v. New York P. & N. R. Co., 5 I. C. C. Rep. 161, 163, (**125**).

not the actual distance over the road making the rate complained of.[25]

62. Distance—Ton-Mile Rate Should Decrease as Length of Haul Increases.

While normally a rate should increase with the distance, this is true only of the total rate, and it is firmly established, as a general rule, that the rate per ton-mile should decrease as the distance increases. As the distance doubles, therefore, the rate would not double although it would increase. In Farrar *v.* East Tenn. V. & G. R. Co.,[26] Commissioner Bragg said:

"It is a very familiar rule in the transportation of freight by railroads and has become axiomatic, that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time, unless there be exceptional conditions modifying this rule. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of our country."

In New Orleans Cot. Exch. *v.* Cincinnati, N. O. & T. P. R. Co.,[27] Commissioner Morrison thus stated the rule:

"It is as nearly settled as anything relating to railroad charges can be, that under like conditions freight can be profitably carried long distances at rates proportionately lower than short distances."[28]

(25) Lincoln Bd. of Tr. v. Missouri Pac. R. Co., 2 I. C. C. Rep. 155 (56).

Minneapolis Ch. of Com. v. Great Nor. R. Co., 5 I. C. C. Rep. 571, 594, (163).

Milwaukee Cham. of Com. v. Chicago, M. & St. P. R. Co., 7 I. C. C. Rep. 481, 508, etc., (244).

(26) 1 I. C. C. Rep. 480, 487, (40).

(27) 2 I. C. C. Rep. 375, 385, (66).

(28) See also Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, 61-2, (13).

Vermont St. Gr. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, 181, (24).

This principle is not, however, one required by the statute and it is subject to qualifications and exceptions.[29] Thus, where the first part of a haul is through a prosperous and thickly settled country and the latter part through a region sparsely populated, the rate per ton-mile may properly increase after the line leaves the settled district.[30]

63. Consistency of Commodity Shipped and Method of Shipment. Since railroad rates,—unlike ocean rates,—are based not on space occupied but on weight carried, an important element in fixing the rate of a commodity is the amount which can be placed

Milwaukee Ch. of Com. v. Flint & P. M. R. Co., 2 I. C. C. Rep. 553, (71).

Lippman v. Illinois Cent. R. Co., 2 I. C. C. Rep. 584, (73).

New Orleans Cot. Exch. v. Illinois Cent. R. Co., 3 I. C. C. Rep. 534, 559, (96).

Coxe v. Lehigh Val. R. Co., 4 I. C. C. Rep. 535, 562, (124-A).

Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 513, (201-A).

Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 31, (291).

St. Louis H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 101, (384-A).

Moran v. Missouri Pac. R. Co., 11 I. C. C. Rep. 598, (425).

Cattle Raisers' Asso. v. Missouri K. & T. R. Co., 13 I. C. C. Rep. 418, 426, (399-C).

See also McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 636, (289).

St. Louis H. & G. Co. v. Illinois Cent. R. Co., 11 I. C. C. Rep. 486, 493, (410).

(29) Mankato Mfgrs. Un. v. Minneapolis & St. L. R. Co., 4 I. C. C. Rep. 79, 85, (107).

Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 31, (291).

(30) Minnesota Bus. Men's Asso. v. Chicago, St. Paul, M. & O. R. Co., 2 I. C. C. Rep. 52, (48).

Minnesota Bus. Men's Asso. v. Chicago N. W. R. Co., 2 I. C. C. Rep. 73, (50).

Lincoln Bd. of Tr. v. Burlington & M. R. Co., 2 I. C. C. Rep. 147, (55).

See also cases where the rate for the shorter distance is restricted by charter:

Johnston v. St. Louis & S. F. R. Co., 12 I. C. C. Rep. 73, (469);

Or by State legislation (infra, Chap. VIII, §99).

in a car.[31] A heavier commodity should not generally be given a lower rate than a lighter one.[32] Similarly, an article of which only a small amount in weight can be loaded in a car should have a higher rate than one which can be loaded less heavily, since the dead weight of the car itself is the same in each case.[33] A heavy carload should properly net the carrier more in the aggregate, although the rate per 100 pounds should be less.[34] So also, an article shipped in a manner to yield more revenue to the carload than that shipped in a different manner, should ordinarily take a lower rate.[35]

In cases, however, where it has appeared that the better method of shipment was accessible only to a limited and powerful class of shippers, the Commission has refused to apply this principle.[36] In another case the Commission would also seem to have unduly

(31) I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1015, (**364-B**).

In Thompson Co. v. Illinois Cent. R. Co., 13 I. C. C. Rep. 657, 665, (**658**), Lane, C., said:

"Among many expert railroad men the revenue per car of freight is recognized as one of the safest criterions as to earnings."

(32) Truck Farmers' Asso. v. Northeastern R. of S. C., 6 I. C. C. Rep. 295, 320, (**191-A**).

(33) Potter Mfg. Co. v. Chicago & G. T. R. Co., 5 I. C. C. Rep. 514, 524, (**160**).

Milk Prod. Asso. v. Delaware L. & W. R. Co., 7 I. C. C. Rep., 92, 112-113, 168, (**220**).

(34) Murphy v. Wabash R. Co., 5 I. C. C. Rep. 122, 129, (**143**).

(35) Milk Prod. Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 169, (**220**).

Cf. Trades League v. Philadelphia W. & B. R. Co., 8 I. C. C. Rep. 368, 374, (**274**).

(36) Independent Refiners' Asso. v. Western N. Y. & Penna. R. Co., 5 I. C. C. Rep. 415, 431, 440, (**155-A**), (but see 208 U. S. 208; 28 Sup. Ct. Rep. 268; 52 L. Ed. 493, (**155-F**), infra).

See also Rice v. Louisville & N. R. Co., 1 I. C. C. Rep. 503, (**42**).

Scofield v. Lake S. & M. S. R. Co., 2 I. C. C. Rep. 90, 111, (**51**).

Re Relative Tank & Bbl. Rates on Oil, 2 I. C. C. Rep. 365, (**65**).

Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, (**111**).

Rice v. Cincinnati W. & B. R. Co., 5 I. C. C. Rep. 193, (**147**).

In these cases the Commission refused to sanction a rate per 100 pounds on oil in tank cars less than that charged on oil in barrels, and in certain of them ordered the carriers to cease charging for the weight of the barrel wherever they did not charge for the weight of the tank which was part of the car. The Standard Oil Co. owned practically all the

disregarded the element of car capacity, holding that cotton shipped in round bales, loading 45,000 to 50,000 pounds to the car, was not entitled to a lower rate per 100 pounds than that shipped in square bales, loading but 25,000 pounds to the car.[37]

The attitude of the Commission would seem to be that where a commodity is shipped in different kinds of packages, the same rate per 100 pounds should be applied to each[38] unless a reason be shown why this is not proper.[39]

The consistency of a commodity of course affects the risk to the carrier in transporting it, and this the road is entitled to consider in fixing rates. Where an article is of a perishable nature, so as to require exceptional speed in transportation, a higher rate is proper on account of this.[40] The element of risk is also affected by the value of the commodity, a more valuable article sub-

tank cars. The Supreme Court, in Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208; 28 Sup. Ct. Rep. 268; 52 L. Ed. 493 (155-F), refused to enforce the order of the Commission in the case first above cited, but did not pass expressly on the point here under discussion.

See also infra, Chap. XIII, §151.

(37) Planters' Compress Co. v. Cleveland C. C. & St. L. R. Co., 11 I. C. C. Rep. 382, (402).

Planters' Compress Co. v. Missouri K. & T. R. Co., 11 I. C. C. Rep. 606, (426), (see dissenting opinion by Prouty, C.)

Cf. also New Orleans Cot. Ex. v. Illinois Cent. R. Co., 3 I. C. C. Rep. 534, 571, (96).

The decisions in first two cases above cited appear to the author to be incorrect and the reasoning in Commissioner Prouty's dissenting opinion conclusive. The decision of the majority was evidently the result of the tendency on the part of the Commission to protect the many against the few. The same attitude would seem to have been responsible for the tank and barrel shipment decisions against the Standard Oil Co. in the previous note.

(38) Cannon v. Mobile & O. R. Co., 11 I. C. C. Rep. 537, 545, (418).

(39) Philadelphia Tr. L. v. Philadelphia W. & B. R. Co., 8 I. C. C. Rep. 368, (274).

See also Rhode Island Egg, etc., Co. v. Lake S. & M. S. R. Co., 6 I. C. C. Rep. 176, 185-6, (182).

(40) American Fr. Un. v. Cincinnati N. O. & T. P. R. Co., 12 I. C. C. Rep. 411, (527).

See also Brady v. Pennsylvania R. Co., 2 I. C. C. Rep. 131, 141, (53). And infra, §72.

jecting the carrier to heavier damages in case of accident, and therefore justifying a higher rate.[41]

64. Car Supply.

(See also infra, Chap. XV. §§170-177).

A rate in a direction in which there is a prevalence of empty cars may properly be lower than in the opposite direction, in which cars are scarce.[42] This consideration is frequently the explanation of differences between east and westbound rates.[43]

Similarly, traffic to a point from which there is an abundance of return freight is ordinarily carried at a less rate than where the cars would have to be hauled back empty.[44]

Rates on coal may properly be lower in summer than in winter, owing to the greater scarcity of coal cars during the latter season.[45]

65. Volume of Traffic and Amount of Shipment—Rates Should Ordinarily Decrease as Tonnage Increases.

Rates through a sparsely settled country are properly higher than those through a region where the volume of the traffic is

(41) The cases with reference to the importance of the value of the commodity are collected, infra, §74.

(42) James v. E. Tenn., Va. & Ga. R. Co., 3 I. C. C. Rep. 225, 236, (84).

Lehmann & Co. v. Southern Pac. R. Co., 4 I. C. C. Rep. 1, 20-21, (103).

Shumacher v. Chicago R. I. & P. R. Co., 6 I. C. C. Rep. 61, 70, (172).

Weil v. Penna. R. Co., 11 I. C. C. Rep. 627, (432).

Phillips v. Grand Trunk W. Ry. Co., 11 I. C. C. Rep. 659, 665, (436).

(43) See, however, Menasha Co. v. Atchison T. & S. F. R. Co., 11 I. C. C. Rep. 666, (437).

(44) Minneapolis Ch. of Com. v. Great Nor. R. Co., 5 I. C. C. Rep. 571, 593, (163).

Tift v. Southern Ry. Co., 10 I. C. C. Rep. 548, 586, (370).

U. S. v. Chicago & N. W. R. Co., 127 Fed. 785, 790, (332).

And cf. Riddle, Dean & Co. v. Pittsburgh L. E. R. Co., 1 I. C. C. Rep. 374, 386, (34).

U. S. ex rel. v. Delaware, L. & W. R. Co., 40 Fed. 101, (87).

But cf. Savannah Bur. of F. & T. v. Louisville & N. R. Co., 8 I. C. C. Rep. 377, 402, 405, (275-A).

(45) I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 426-427, (156-B).

Cf. however, Re Louisville & N. R. Co., 5 I. C. C. Rep. 466, 476, (156-A).

greater,[46] and ordinarily an increase of tonnage should result in a lowering of rates.[47]

From some decisions by the Commission it would appear that this principle would be applied only as regards the volume of the traffic in general and not as regards the volume of shipments in a given commodity.[48] The Commission has frequently held, however, that rates on staple commodities such as lumber, iron, grain, cotton, etc., should ordinarily be lower than the average rates on other freight.[49] Although these decisions may be rested on the fact that the commodities are easily transported and are most of them of high specific gravity, yet it would certainly seem

(46) Warner v. New York Cent. & H. R. R. Co., 4 I. C. C. Rep. 32, 39, (**104**).
Murphy v. Wabash R. Co., 5 I. C. C. Rep. 122, 135, (**143**).
Lincoln Creamery v. Union Pac. R. Co., 5 I. C. C. Rep. 156, (**145**).
Artz v. Seaboard Air Line, 11 I. C. C. Rep. 458, (**405**).
Brabham v. Atlantic Coast Line, 11 I. C. C. Rep. 464, (**407**).
Dallas Frt. Bur. v. G. C. & S. F. R. Co., 12 I. C. C. Rep. 223, (**501**).
Memphis Frt. Bur. v. Fort Sm. & W. R. Co., 13 I. C. C. Rep. 1, 9, (**561**).

(47) Re Food Product Rates, 4 I. C. C. Rep. 48, 72, (**106**).
Central Y. P. Asso. v. Illinois C. R. Co., 10 I. C. C. Rep. 505, 546, (**369-A**).
Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 583, (**370**).
Kentucky R. Com. v. Louisville & N. R. Co., 13 I. C. C. Rep. 300, 307, (**614**).
Cattle Raisers' Asso. v. Missouri K. & T. R. Co., 13 I. C. C. Rep. 413, 430, (**399-C**).

(48) See Export & Domestic Rates, 8 I. C. C. Rep. 214, 259, (**265**).
But cf. Scheidel v. Chicago & N. W. R. Co., 11 I. C. C. Rep. 532, 536, (**416**).

(49) Colorado Fuel Co. v. Southern R. Co., 6 I. C. C. Rep. 488, 515, (**201-A**).
Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 398, (**313**).
Marten v. Louisville & N. R. Co., 9 I. C. C. Rep. 581, 589, (**325**).
Central Yellow Pine Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 547, (**369-A**).
Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 589, (**370**).
Burgess v. Trans-Cont. Fr. Bur., 13 I. C. C. Rep. 668, 678, (**659**).

that the great volume of traffic in them has influenced the Commission in holding that they should take less than average rates.[50]

66. Same Subject—Wholesale Principle not Generally Applicable to Freight Rates.

(See also infra, Chap. XIII, §§149-151).

One of the principal objects of the Interstate Commerce Act—perhaps *the* principal object—was to put a stop to discriminations in rates in favor of large and powerful shippers as against their weaker competitors. This practice on the part of the carriers had not been inspired by any kindly feeling toward the large shippers, but had been adopted in the interest of the railroads themselves, as the result of competition with other carriers, and by reason of the importance of securing the great volume of traffic controlled by the large shippers. Transportation, like any other business, can, of course, be profitably carried on at cheaper rates wholesale than retail. Viewed from an ordinary business standpoint, a shipper furnishing 100,000 tons of freight a month might reasonably expect to get a lower rate than one who furnished but 10 tons, just as he would expect to get a barrel of apples cheaper per apple than if he bought a single one. But to allow free scope to the wholesale principle, as applied to freight rates, would be to justify the continuance of practically all the evils to which it was the obvious purpose of the Act to put a stop.[51] The Commission and the Courts, bearing in mind the object of the Act, have therefore refused to sanction special rates based on the amount of the annual traffic furnished.[52]

(50) The Commission would probably refuse to sanction a lower rate because of increased volume of traffic for a specific individual or locality, but would favor such where it enured to the benefit of all shippers alike. See discussion following.

(51) See Knapp, C., in Brownell v. Columbus & C. M. R. Co., 5 I. C. C. Rep. 638, 655, (**167**).

(52) Providence Coal Co. v. Providence & W. R. Co., 1 I. C. C. Rep. 107, (**17**).
Harvard Co. v. Pennsylvania Co., 4 I. C. C. Rep. 212, 223-225, (**114**).
Hays v. Pennsylvania Co., 12 Fed. 309, (1882), (**9**).
Menacho v. Ward, 27 Fed. 529, (1886).
Burlington C. R. & N. R. Co. v. Northwestern Fuel Co., 31 Fed. 652, (1887).
See also U. S. v. Tozer, 39 Fed. 369, 371-372, (1389), (**70**-B).
Beale & Wyman on Railroad Rate Regulation, §§749-761.

67. Same Subject—Exceptions.

The decisions above referred to are not based on strictly logical grounds, but rather on practical considerations, and on the obvious purpose of the Act. Where the recognition of the wholesale principle will not tend to frustrate the purpose of the Act in giving rise to unjust discriminations or preferences, this principle is given effect. Thus the Supreme Court has held that ten or more persons travelling together may properly be allowed a less rate per passenger than the rate applicable to individuals traveling alone.[53] So also, lower rates have always been sanctioned on carload lots than on shipments in less than carloads,[54] although the Commission has refused to order such lower carload rates to be

Similarly, the Commission has said that an important locality is not entitled to lower rates simply by reason of its greater traffic.

Cordele Machine Co. v. Louisville & N. R. Co., 6 I. C. C. Rep. 361, 376, (**198**).

Fewell v. Richmond & D. R. Co., 7 I. C. C. Rep. 354, 372, (**237**).

Holdzkom v. Michigan Cent. R. Co., 9 I. C. C. Rep. 42, 52, (**292**).

And cf. Detroit, G. H. & M. R. Co., v. I. C. C., 74 Fed. 803, 822, (**100**-C).

The greater competition between carriers at large towns does, however, justify lower rates, under the later decisions.

See Michie v. New York, N. H. & H. R. Co., 151 Fed. 694, (**455**).

See infra, Chap. XII, for a full discussion of the different principles applicable to cases involving preferences among localities from those governing discriminations between individuals.

(53) I. C. C. v. Baltimore & O. R. Co., 145 U. S. 263; 36 L. Ed. 699; 12 Sup. Ct. 844, (**91**-C).

This decision reversed the Commission's ruling in Re Passenger Tariffs, 2 I. C. C. Rep. 649, (1889), and in Pittsburgh C. & St. L. R. Co. v Baltimore & O. R. Co., 3 I. C. C. Rep. 465, (**91**-A).

In two Federal cases it has been cited as supporting the position that the wholesale principle is applicable to freight rates.

I. C. C. v. Detroit G. H. & M. R. Co., 57 Fed. 1005, 1011, (**100**-B).

I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1015, (**364**-B).

The latter conclusion, unless greatly qualified, is believed to be erroneous.

(54) Thurber v. New York Cent. & H. R. R. Co., 3 I. C. C. Rep. 473, (**92**).

Harvard Co. v. Pennsylvania R. Co., 4 I. C. C. Rep. 212, 223, (**114**).

put in force against the carriers' will, where this would tend to benefit the large dealer at the expense of the small.[55]

Similarly, it has always been recognized as proper to allow lower rates per ton-mile for long than for shorter distances.[56]

(55) Brownell v. Columbus & C. M. R. Co., 5 I. C. C. Rep. 638, 654, 656, (167).

Schumacher Co. v. Chicago, R. I. & Pac. R. Co., 6 I. C. C. Rep. 61, 83, (172).

Kindel v. Boston & A. R. Co., 11 I. C. C. Rep. 495, 506, (412).

Paper Mills Co. v. Pennsylvania R. Co., 12 I. C. C. Rep. 438, 444, (534).

Milwaukee Co. v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 28, (566).

The Commission based its ruling in these cases on the fact that to grant the relief asked for would help the large shippers against their small competitors. See infra, §290. In several cases, however, where it appeared for the best interest of all shippers, the Commission has ordered the carriers to put in force carload rates on mixed carloads of several similar commodities.

Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co., 5 I. C. C. Rep. 663, (169).

Roth v. Texas & Pac. R. Co., 9 I. C. C. Rep. 602, (326).

See also Thurber v. New York Cent. R. Co., 3 I. C. C. Rep. 473, 509-511, (92).

Buckeye Buggy Co. v. Cleveland C. C. & St. L. R. Co., 9 I. C. C. Rep. 620, 625, 631, (328).

And cf. Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 8, (46).

The Commission has held that a carrier cannot legally transport a mixed carload of passengers and freight at a stated rate per car. The reason for this decision would not seem clear.

Re Free Trans. of Newspaper Emp., 12 I. C. C. Rep. 15, 18, (448).

An unreasonable difference in carload and less-than-carload rates, greater than warranted by the difference in the cost of the service, is an unjust discrimination against the small shippers.

Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 109, (173).

Business Men's League v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 318, 356-357, (311).

See also Scofield v. Lake Shore & M. S. R. Co., 2 I. C. C. Rep. 90, 109, (51).

Barrow v. Yazoo & M. V. R. R. Co., 10 I. C. C. Rep. 333, (353).

And cf. Masurite Co. v. Pittsburg & L. E. R. Co., 13 I. C. C. Rep. 405, 408, (626).

(56) See cases, supra, §60.

Although this depends, of course, to a certain extent on the fact that the terminal charges are the same in each case, nevertheless the wholesale idea is undoubtedly a factor in establishing this principle.

68. Same Subject—Summary of Decisions.

In all of the instances in the preceding section, the cost of the service is proportionally greater in case of the smaller shipments, and the recognition of this difference will not tend to produce undue favoritism to large shippers. It might be said that this is true in reference to all cases of reasonable differences of rates based on the amounts of *particular shipments* as distinguished from differences in the volume of the *annual traffic* of different shippers; and several Federal cases arising under the common law prior to the passage of the Act would seem to support this view.[57] The Commission, however, although in one case intimating that it might sanction a lower rate per car on shipments of carloads of cattle than on one carload,[58] has expressly held that cargo rates less than regular rates per carload are improper.[59] But in spite of this decision it is believed that if a case were presented where it appeared that it was substantially cheaper to haul certain freight when presented in trainloads than when tendered a car at a time, the Commission or the Courts would sanction a difference in rates between the two. Probably they would never order the carrier to put in force a lower trainload rate against its will.

(57) Menacho v. Ward, 27 Fed. 529, (1886).

Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co., et al, 31 Fed. 652, (1887).

These cases, although recognizing the principle stated in the text, held the difference in the rates there involved to be so great as to be unreasonable.

See also Hays v. Penna. Co., 12 Fed. 309, (9).

Union Pac. Ry. Co. v. Goodrich, 149 U. S. 680; 37 L. Ed. 986; 13 Sup. Ct. 970, (68-B).

And cf. Nicholson v. Great W. R. Co., 4 C. B. (N. S.), 366.

The adoption of the rule suggested in the text would amount to a recognition of difference in the actual cost of transportation, without recognizing the business principle that merchants are usually willing to do a large business on a smaller margin of profit than a small one.

(58) New Orleans Live St. Co. v. Texas & Pac. R. Co., 10 I. C. C. Rep. 327, 331, (352).

In this case it appeared that the cost of service per car in receiving and hauling ten carloads lots was very much less than in case of single cars.

(59) Paine Bros. v. Lehigh Val. R. Co., 7 I. C. C. Rep. 218, (228).

69. Nature of the Service.

It has been stated by the Commission that a rate for the transportation of a commodity as an incident to the transportation of other commodities, may properly be lower than where the same service is entirely disconnected from any other traffic, and that return of empty egg cases may therefore properly be at a lower rate than if these cases proceeded on an entirely independent shipment.[60] So also, the railroads often return fruit crates to shippers without extra charge, but this fact is of course taken into consideration in fixing the rate on the original shipment.[61]

70. Rates Over Branch Lines and Narrow Gauge Roads.

Since the traffic on branch lines is usually light, rates over such lines are ordinarily higher than those in force on the main lines,[62] especially where the branch is a narrow-gauge, making transshipment necessary. A branch line, however, operated as a feeder to the main system, cannot be expected to pay for itself directly by rates charged for transportation handled by it alone, without consideration of the returns on long haul traffic furnished by it to the main line.[63] The Commission has on several occasions fixed rates over branch lines no higher than over the main line, recognizing in so doing, however, that such was exceptional.[64]

(60) Rhode Island Egg & Butter Co. v. Lake Shore & M. S. R. Co., 6 I. C. C. Rep. 176, 188, (**182**).

See also Minneapolis Co. v. Chicago, R. I. & Pac. R. Co., 13 I. C. C. Rep. 128, (**586**).

And cf. Admin. Rul. No. 42, (Mar. 3, 1908).

(61) Compare Tar. Circ. 15-A, Rule 78, holding that the carrier may properly return free, or at reduced rates, freight damaged in transit or refused by consignees. Its tariffs must state this rule, however, to make it legal.

(62) Lehmann v. Texas & Pac. R. Co., 5 I. C. C. Rep. 44, 55-6, (**139**).

Anthony Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 605, 609, (**650**).

(63) Delaware St. Gr. v. New York, P. & N. R. Co., 4 I. C. C. Rep. 583, 606, (**125**).

See also I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, 624, (**275-B**).

Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 140-1, (**111**).

(64) Lehmann v. Southern Pac. R. Co., 4 I. C. C. Rep. 1, 28, (**103**).

Mankato Mfrs. Union v. Minneapolis & St. L. R. Co., 4 I. C. C. Rep. 79, (**107**).

Milk Prod. Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 171, (**220**).

De Cou v. Penna. R. Co., 12 I. C. C. Rep. 160, (**488**).

71. Indirect Advantages to the Carrier.

The fact that it is to the advantage of a railroad to build up a certain industry or community would not seem to justify it in allowing exceptionally low rates for that purpose to a particular shipper or locality.[65]

Similarly, railroad material is not entitled to special rates.[66]

The Commission has held that the fact that a given city has subscribed toward the building of its line does not justify a rate preference of it over other towns.[67]

72. Miscellaneous Circumstances Affecting Cost of Service—Bridge Charges—Special Facilities, etc.

The necessity of the payment of a bridge charge by a railroad is of course a proper factor in fixing the rate.[68] It is also entitled

(65) Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, 67, (**13**).
Larrison v. Chicago & G. T. R. Co., 1 I. C. C. Rep. 147, (**21**).
Smith v. Northern Pac. R. Co., 1 I. C. C. Rep. 208, 209, 212, (**28**).
Elvey v. Illinois Cent. R. Co., 3 I. C. C. Rep. 652, 656, (**101**).
Chicago Bd. of Tr. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, 188, (**112**).
Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 516, (**201**-A).
Savannah Bur. of F. & T. v. Louisville & N. R. Co., 3 I. C. C. Rep. 377, 405, (**275**-A).
Re Party Rate Tickets, 12 I. C. C. Rep. 96, (**474**).
I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, (**275**-B).
But see U. S. v. Chicago & N. W. R. Co., 127 Fed. 785, 790, (**332**).
Patten v. Wisconsin Cent. R. Co., 14 I. C. C. Rep. 189, 190, (**682**).
See also infra, §134, as to how far the interest of the carrier justifies a preferential rate relation; also §§153 and 156.

(66) Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 505-6, 516, (**201**-A).
Cf. Paxton T. Co. v. Detroit S. R. Co., 10 I. C. C. Rep. 422, (**363**).
Where the carrier buys railroad material, the subsequent transportation of such material is not for any shipper and would not seem to be within the scope of the Act.
See infra, §§131, 174.

(67) Lincoln Bd. of Tr. v. Burlington & M. R. Co., 2 I. C. C. Rep. 147, (**55**).

(68) Cincinnati Frt. Bur. v. Cincinnati, N. O. & T. Pac. R. Co., 7 I. C. C. Rep. 180, 190, (**221**).
Omaha Com. Club v. Chicago & N. W. R. Co., 7 I. C. C. Rep. 386, 405, (**240**).

to collect from shippers other similar charges imposed upon it by the State authorities in the course of transportation, but cannot collect such unless charges were actually made.[69]

The allowance of extra special facilities of course entitles the railroad to exact extra charges. Thus where perishable commodities are transported at high speed a higher rate is proper,[70] and if the trains habitually fail to make the fast time, the extra rate becomes unreasonable.[71] So also a rate may properly be advanced where the advanced rate includes insurance not previously covered by it, but the insurance must be adequate and be worth the amount of the advance to the shipper.[72] An increase of 20 per cent., conditioned on a removal of the carrier's limitation of liability, was held unreasonable.[73]

It has been held that rate may properly be based on the weight at the point of shipment without allowance for admitted shrinkage.[74] The shrinkage, however, would be considered in fixing the rate in such a case.[75]

(69) Pacific Coast Job. As. v. Southern Pac. R. Co., 12 I. C. C. Rep. 319, (515).

Cf however, Admin. Rul. No. 62, where the Commission said that charges by carriers subject to the Act might not properly be included, but joint tariffs, concurred in by such carriers, should be filed.

(70) Topeka B. D. Asso. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 620, 630-631, (653).

(71) American Fr. Un. v. Cincinnati, N. O. & T. P. R. Co., 12 I. C. C. Rep. 411, (527).

See, however, Phelps v. Texas & Pac. R. Co., 6 I. C. C. Rep. 36, 46, (171), where it was intimated that the release of defendant's lien did not justify an increased rate.

Cf. Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 103, (173).

A carrier is not, however, bound to reduce its rates while making repairs which necessitate a slow schedule.

American Fr. Un. v. Cincinnati, N. O. & T. P. R. Co., 12 I. C. C. Rep. 411, 417, (527).

(72) Wyman v. Boston & M. R. Co., 13 I. C. C. Rep. 258, (607).

See also Re Released Rates, 13 I. C. C. Rep. 550, 564-565, (642).

(73) Re Released Rates, 13 I. C. C. Rep. 550, 564-565, (642).

(74) Topeka B. D. Asso. v. St. L. & S. F. R. Co., 13 I. C. C. Rep. 620, 625-626, (653).

(75) Cf. White v. Baltimore & O. S. W. R. Co., 12 I. C. C. Rep. 306, 307, (512).

CHAPTER VII.

JUST AND REASONABLE CHARGES—CIRCUMSTANCES PROPERLY CONSIDERED BY CARRIERS IN FIXING RATES—VALUE OF SERVICE TO SHIPPERS.[1]

73. General Commercial Prosperity.

74. Market Value of Commodities Shipped.

75. Cost of Manufacture or Production of Commodities Shipped.

76. Natural Advantages or Disadvantages of Shipper or Locality—Commercial or Market Competition.

77. Same Subject—Carriers are Justified in Equalizing Natural Advantages by Differences in Rates.

78. Same Subject—Limitations on above Principle.

79. Competition with Other Carriers.

73. General Commercial Prosperity.

Although, as heretofore stated, a railroad is not justified in charging exorbitant rates merely because a shipper can afford to pay such rates, it has been recognized by the Commission that where reductions in rates have been made by reason of commercial depression, corresponding advances may with propriety occur when that depression is relieved.[2] It would seem, however, that the carriers would not be held justified in increasing rates on a commodity merely because the margin of profit on such commodity to the shipper had grown larger.[3] The soundness of this

(1) As heretofore stated, many of the considerations which are important in influencing the fixing of rates, as viewed from the shipper's standpoint, are also important from the point of view of the carrier. The value of the commodity, for instance, affects the risk to the carrier and also the amount of return to the shipper from the transportation. The grouping here attempted is not, therefore, absolutely accurate and is adopted merely for purposes of convenience.

The following are the principal recognized considerations which influence rates as affecting the Value of the Service to the shipper.

(2) Re Proposed Adv. in Frt. Rts., 9 I. C. C. Rep. 382, 386, (**313**). Re Rates from St. Louis to Texas, 11 I. C. C. Rep. 238, 271, (**397**).

(3) See Re Proposed Adv. in Frt. Rts., 9 I. C. C. Rep. 382, 401, 406-407, (**313**).

Central Y. P. Ass'n. v. Illinois C. R. Co., 10 I. C. C. Rep. 505, 536, (**369-A**).

conclusion, whether viewed from a legal or from an economic standpoint, would not appear to be free from doubt.

74. Market Value of Commodities Shipped.

The market value of an article bears a material relation to the proper rate to be charged for its transportation, and more valuable articles properly command higher rates.[4] The Commission has held, however, that the mere showing that more valuable articles than that in question were carried at the same rate was not sufficient, without evidence of other circumstances influencing the rate, to render it *prima facie* unreasonable,[5] and in another case

Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 582, (**370**); 138 Fed. 753, 763, (**319-B**).

Re Rates from St. Louis to Texas, 11 I. C. C. Rep. 238, 271, (**397**).

Cattle Raisers' Ass'n. v. Missouri, Kas. & Tex. R. Co., 11 I. C. C. Rep. 296, 348, (**399-A**); 13 I. C. C. Rep. 418, 429, (**399-C**).

Oregon & W. Co. v. Union Pac. R. Co., 14 I. C. C. Rep. 1, (**661**), (see Knapp, Ch., dissenting, pp. 20-22).

Union Pac. R. Co. v. Goodridge, 149 U. S. 680, 695; 13 Sup. Ct. 970; 37 L. Ed. 986, (**68-B**).

(4) Warner v. New York C. & H. R. Co., 4 I. C. C. Rep. 32, 38-39, (**104**).

Florida Railroad Commission v. Savannah, F. & W. R. Co., 5 I. C. C. Rep. 136, 141, (**137**).

Loud v. South Carolina R. Co., 5 I. C. C. Rep. 529, 543, (**161**).

Truck Farmers' Association v. Northeastern R. Co., of S. C., 6 I. C. C. Rep. 295, 320, (**191-A**).

South Carolina Board of R. R. Commissioners v. Florida Railroad, 8 I. C. C. Rep. 1, 18, (**253**).

Rates from St. Louis to Texas, 11 I. C. C. Rep. 238, 271, (**397**).

National Machinery Co. v. Pittsburg, C., C. & St. L. R. Co., 11 I. C. C. Rep. 581, 585, (**422**).

Van Camp Co. v. Chicago, I. & L. R. Co., 12 I. C. C. Rep. 79, (**472**).

Re Released Rates, 13 I. C. C. Rep. 550, 564, (**642**).

Georges Cr. Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 127, (**675**).

I. C. C. v. Delaware, L. & W. R. Co., 64 Fed. 723, 724, (**180-B**).

In fixing express rates, value does not seem to be regarded as of so much importance as in case of freight rates.

See Ullman v. Adams Exp. Co., 14 I. C. C. Rep. 340, (**701-A**).

(5) Grain Sh. Ass'n. v. Illinois Cent. R. Co., 8 I. C. C. Rep. 158, 175, (**263**).

See, however, Riverside Mills Co. v. Southern R. Co., 12 I. C. C. Rep. 388, (**524**).

Union Pac. T. Co. v. Penna. R. Co., 14 I. C. C. Rep. 545, (**719**).

I. C. C. v. Delaware, L. & W. R. Co., 64 Fed. 723, 724, (**180-B**).

See also supra, §§73, 74.

the Commission disregarded a comparatively small difference in value, where it appeared that the cost of producing the more valuable articles was considerably greater.[6]

Staple commodities, of low value per ton, are usually given low rates.[7]

Raw material should usually be transported at less rates than those allowed on the products thereof,[8] the value of the article being presumably enhanced by the labor performed on it. In some instances, however, where the products are not in fact more valuable per 100 pounds, rates on the materials may properly be higher.[9]

Where the value of an article enters into the determination of the proper rate to be charged for its transportation, the market value is the test and not the intrinsic value. If the shipper adver-

(6) McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 640, (289).
See also Georgia As. v. Atlantic C. L. R. Co., 10 I. C. C. Rep. 255, 276-277, (348).

(7) Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, (201-A).
Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 398, (313).
Marten v. Louisville & N. R. Co., 9 I. C. C. Rep, 581, 589, (325).
Central Yellow Pine Ass'n. v. Illinois C. R. Co., 10 I. C. C. Rep. 505, 547, (369-A).
Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 589, (370).
Burgess v. Transcontinental Fr. Bur., 13 I. C. C. Rep. 668, 678, (659).

(8) Hurlburt v. Lake S. & M. S. R. Co., 2 I. C. C. Rep. 122, (52).
Re Export and Domestic Rates, 8 I. C. C. Rep. 214, 244, (265).
Chicago Live Stock Exchange v. Chicago Gr. W. R. Co., 10 I. C. C. Rep. 428, 451, (364-A).
Howard Mills Co. v. Missouri Pac. R. Co., 12 I. C. C. Rep. 258, 261, (508).
Forest City Fr. Bur. v. Ann Arbor R. Co., 13 I. C. C. Rep. 109, 114, (582).

(9) Procter v. Cincinnati, H. & D. R. Co., 4 I. C. C. Rep. 87, (109).
Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 148, 548, (180-A); (64 Fed. 723), (180-B).
See also Re Rates on Corn, 11 I. C. C. Rep. 227, 228, (394).

tises and sells a commodity as an expensive article, the carrier is entitled to transport it as such.[10]

75. Cost of Manufacture or Production of Commodities Shipped.

Although the Commission has made a number of statements to the effect that the cost of production of an article is not a material circumstance in the fixing of the rate thereon,[11] yet in many instances the parties have been allowed to go at length into evidence as to this circumstance.[12]

The reason for this seeming discrepancy in the opinions of the Commission lies in the conflicting considerations which determine rates,—the cost of service to the carrier, the value of the service to the shipper, and the interest of the general public in the traffic. Although a railroad is not bound to haul goods at a loss to itself, yet where it appears that it is getting some return for the service, it is certainly entitled to charge a higher rate on commodities on which the shipper is making a high profit, by transporting them to market, than on those on which he is making little or none.[13] The value of the service to the shipper is in the first case much greater, and it is to the general public interest that those industries which can best afford it, shall pay a somewhat larger share of the total transportation charges. Although railroad rates are not to be regulated on the principle of taxation, nevertheless this principle certainly enters, to some extent, into their determination.[14]

(10) Warner v. New York Cent. & H. R. R. Co., 4 I. C. C. Rep. 32, 38, (**104**).

Andrews Soap Co. v. Pittsburg C. C. & St. L. R. Co., 4 I. C. C. Rep. 41, (**105**).

See also Re Released Rates, 13 I. C. C. Rep. 550, 553-4, (**642**).

(11) Phillips Co. v. Grand T. W. R. Co., 11 I. C. C. Rep. 659, 664, (**436**).

Re Rates on Corn, 11 I. C. C. Rep. 212, 217, etc., (**394**).

See also Loud v. South Car. R. Co., 5 I. C. C. Rep. 529, 545, (**161**).

Union Pac. R. Co. v. Goodridge, 149 U. S. 680, 695; 13 Sup. Ct. 970; 37 L. Ed., 986, (**68-B**).

(12) See, for example, McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 640, (**289**).

Re Food Products Rates, 4 I. C. C. Rep. 48, 74 et seq. (**106**).

(13) See Central Y. P. Ass'n. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 538-9, (**369-A**).

(14) See Re Proposed Adv. in Frt. Rates, 9 I. C. C. Rep. 382, 401, (**313**).

It is thus apparent that, although the cost of production of an article is not properly, by itself, any test as to the proper rate to be charged for its transportation, yet, taken in connection with the market value of the commodity at the point of destination, it is important as determining the value of the service of transportation to the shipper, the rate that the traffic in question can bear, and whether or not the rate under discussion is so high as to deprive the community of the advantages incident to the continuance of the traffic.

In a number of cases shippers have urged that lower rates should be given to certain commodities, by reason of the fact that such commodities had already paid local rates from the outlying district to the proposed point of shipment. The Commission has held that this fact was of no weight in fixing or passing on the reasonableness of the rates. In these cases, however, its attention was evidently directed to the consideration that such cases did not come within the rule that ordinarily a less rate per mile should be charged on long than on short hauls. There being no continuity in the journey and the proposed shipment being in no sense part of a through haul from the outlying points, the Commission ruled that the rate for the distance in question must be computed without regard to the prior haul.[15]

It would seem, however, that in so far as the local rates previously paid were part of the prior expense of the shipper in connection with the commodity, this fact might perhaps be of some weight in determining a proper rate to be charged on re-shipment. It would tend to show the value of the service rendered and the rate that the traffic would bear, by a comparison of the previous expense of the shipper in connection with the article to be shipped, with the price he could get for it at the proposed destination.

76. Natural Advantages or Disadvantages of Shipper or Locality—Commercial or Market Competition.[16]

It has very frequently been said by the Commission that it is not its province to equalize geographical or other advantages

(15) See infra, §189.

(16) The influence of competition between both markets and carriers is fully discussed in connection with Preferences between Localities, Chap. XVII. At this point a brief summary of the cardinal principles involved is all that is attempted, without citation of the many authorities. These are collected in the chapter above indicated.

among shippers or localities, and that an advantageous situation properly entitles a shipper or locality to an advantage in rates, of which he should not be deprived by giving an equal rate to his more poorly situated competitor.

These expressions were principally during the early years of the Commission's existence, when market or commercial competition was not yet recognized as a justification for preferring one locality over another in respect to railroad rates. Since the decisions in the Supreme Court in the Alabama Midland [17] and Behlmer [18] cases, it has been recognized that the carriers are justified in giving to a poorly situated shipper or locality lower rates in order to enable him to compete with shippers from other points better situated, provided the difference in rates be not unreasonably great. From the point of view of the carrier the poorly situated shipper must be given a lower rate or he will not ship at all; from such shipper's point of view, the value of the service rendered him is less than that to his rival, whose profit from the transportation of his goods to the market in question, at rates based merely on cost of service, would be much higher; finally it is clearly to the interest of the general public that every market be supplied from as many different localities as is possible without actual loss to the carrier and shipper.[19]

77. Same Subject—Carriers are Justified in Equalizing Natural Advantages by Differences in Rates.

These considerations have resulted in the recognition of the principle that in making a rate from a given locality, the carrier is justified in taking into consideration the geographical situation and the other natural advantages or disadvantages of that locality, and in equalizing, to a certain extent, such advantages, by giving to the poorly situated locality better relative rates than those allowed his more favorably located competitor. In cases, also, not involving any question of relative rates between competitive points, the carrier may, in fixing its rates, properly take into consideration the

(17) I. C. C. v. Alabama Md. R. Co., 168 U. S. 144; 42 L. Ed. 414; 18 Sup. Ct. 45, (**170**-D), (see infra, §198).

(18) Louisville & N. R. Co. v. Behlmer, 175 U. S. 648; 44 L. Ed. 309; 20 Sup. Ct. 209, (**186**-D), (infra, §200).

(19) See also supra, §§56-58.

geographical advantages of shippers, as affecting the amount which such shippers can afford to pay for transportation.

78. Same Subject—Limitations on Above Principle.

It must be remembered, however, in considering the weight properly to be given to Value of Service, or to the "general interest of the public," that these considerations operate only within certain maximum and minimum limits. Under no circumstances is a carrier required to allow or justified in allowing any shipper or locality a rate which does not pay the actual expense of transportation, exclusive of interest on fixed charges,[20] merely because such a rate is necessary to enable the traffic to move.[21] This would result either in the carrier's making up its loss by charging unreasonably high rates to other shippers and localities, or in the bankruptcy of the road. Also, the carrier is not justified in charging an exorbitant or excessive rate merely because the shipper is so advantageously situated that he can afford to pay it.[22]

In short, a carrier is justified in regulating its rates in relation to the situation of the shipper or locality, provided the rates from a point having a poor situation or poor natural advantages be not unreasonably low, and provided those from a favorably situated locality be not exorbitant or unreasonable *per se*.[23]

The equalization of advantages between localities rests, however, in the discretion of the carriers, and if a railroad does not see fit to give better relative rates to a poorly situated point, neither the Commission nor the courts will compel it to do so.[24]

(20) In Noyes on American Railroad Rates, p. 29, the author speaks of this cost as "the expense which would not have been incurred had the service not been rendered."

(21) See supra, §§51, 56, infra, §205.

(22) See supra, §51, infra, §203.

(23) See further as to this whole subject, infra, Chap. XVII.

(24) See cases, infra §89.

The foregoing considerations do not apply to relative rates between rival shippers from the same shipping point, for in this case the decisions hold that neither commercial competition nor that of other carriers justifies a difference in rates.

See infra, Chap. XII.

79. Competition with Other Carriers.[25]

The considerations discussed in the three preceding sections are applicable to the question of the influence on relative rates of competition among carriers. A shipper at a point where there are competing lines will divert his freight to the road offering the lowest rates. The measure of the value of the service to him by transportation over a given line depends on the amount which it would cost him to have the service done by the other carriers.[26] Although the Commission at first denied the right of a road to prefer one locality over another by reason of competition between carriers subject to the Act at the preferred point, it has always recognized that increased competition among carriers is normally productive of lower rates.[27]

Since the decisions by the Supreme Court holding that competition between carriers subject to the Act justifies rate preferences between localities, the Commission has, of course, recognized that a competitive point may properly be allowed better rates than a non-competitive one, provided the rates allowed the former are remunerative and those to the latter are not unreasonable *per se*.[28]

(25) See supra, §76 n(16).

(26) See Duluth Com. Cl. v. Northern Pac. R. Co., 13 I. C. C. Rep. 288, 292, (611).

(27) Morrell v. Union Pac. R. Co., 6 I. C. C. Rep. 121, 128, (176). Evans v. Union Pac. R. Co., 6 I. C. C. Rep. 520, 542, (203). See also I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1015, (364-B). U. S. v. Joint Tr. Ass'n., 171 U. S. 505, 577; 19 Sup. Ct. 25; 43 L. Ed. 259, (1898).

(28) See infra, Chap. XVII, for a full discussion of the authorities.

As in the case of market or commercial competition, competition between carriers does not justify discriminations among individuals but only preferences among localities. See infra, Chap. XII.

CHAPTER VIII.

JUST AND REASONABLE CHARGES—ADDITIONAL CIRCUMSTANCES CONSIDERED BY THE COMMISSION AND THE COURTS IN PASSING ON THE REASONABLENESS OF RATES.

80. General Principles
81. Effect of Proposed Order—Elaborate System of Rates will not be Disturbed unless Clearly Necessary.
82. Same Subject—Creation of Causes of Complaint on the Part of other Shippers.
83. Effect of Proposed Order on Revenue of Carriers.
84. History of the Origin of the Rate or System of Rates in Question.
85. Voluntary Continuance by Carriers of a Given Rate for a Long Period.
86. Same Subject—Circumstances Justifying Advance of Long Standing Rates.
87. Voluntary Reduction of Rate not a Conclusive Admission of Prior Unreasonableness.
88. Investment of Capital by Shippers in Reliance on Continuance of Rates in Question.
89. The Commission Will not make an Order Tending to Equalize Natural Advantages.
90. Comparison of Rates.
91. Same Subject — Distinction between Cases of Reasonable Rates and those Involving Questions of Preference or Discrimination.
92. Same Subject—Presumption of Reasonableness of Rates —Burden of Proof.
93. Same Subject—Rates on Other Commodities between the Same Points.
94. Same Subject — Rates between Different Points on the Same Road.
95. Same Subject—Rates over other Lines.
96. Same Subject—Through and Local Rates—General Considerations to be Borne in Mind in Comparing such Rates.
97. Same Subject — Through Rates should Normally be Less than Sum of Locals.
98. Same Subject—Exceptions to Foregoing Rule — Basing Point Rates.
99. Same Subject — Through Rates Exceeding Combined Locals *prima facie* unreasonable.
100. Same Subject—Significance of Division of Through Rates among Connecting Carriers.
101. Concert of Action by Naturally Competitive Lines in Fixing the Rates under Investigation.
102. Expert Opinions.
103. Opinions of State Railroad Commissions.
104. Expression of Satisfaction by Shippers with Rates Complained of.

As to practice before the Commission, see also *infra*, Chapter XXV.

80. General Principles.

In addition to the circumstances properly taken into consideration by carriers in fixing their rates,[1] there are certain other matters on which the Commission has laid particular emphasis in passing on the propriety of rates questioned by shippers.[2] These it is proposed to consider briefly in the following pages.

In Frye *v.* Northern Pac. R. Co.,[3] Commissioner Harlan said:

"There is a wide difference in the character of testimony required to test the reasonableness of an entire schedule of rates covering the whole traffic of a particular carrier and that required to test the reasonableness of a rate on a particular commodity between two definite points. Whether an attack upon an entire schedule of rates is well founded or not is to be determined largely by ascertaining whether the gross amount of traffic carried on those rates affords the carrier, above its operating expenses and taxes, a reasonable return upon the fair value of its property. But whether it lies within the possibilities of some system of accounts that may be devised, and that is strongly denied by eminent writers on railway problems, certainly the present state of the science of railway accounting does not enable us upon any such basis to fix with certainty a reasonable rate upon a particular

(1) See supra, Chaps. VI and VII.

(2) In Corn Belt Asso. v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 376, 394, (**704**), Prouty, C., said:

"The interstate rates of this country have not been established upon any consistent theory. They are a process of growth; they have come into existence under the operation of various forces and conditions and are not by deliberate design. With these rates we must deal as we find them. This Commission has no authority to establish general rate schedules. What we take off in one place we can not add in some other. Unless, therefore, the general result of all rates is to yield an undue revenue to the carrier, we should not reduce a particular rate simply because we might think, if establishing that rate *de novo* as part of a general scheme, that it ought to be somewhat lower or somewhat higher in proportion to others. The rate attacked must be so out of proportion as to be unreasonable or must so discriminate as to be undue or must be unlawful for some other special reason."

(3) 13 I. C. C. Rep. 501, 507-8, (**635**).

See also Kindel v. Adams Express Co., 13 I. C. C. Rep. 475, 485, (**634**).

commodity between two points. And neither the complainant nor the defendants have pretended to analyze the operating expenses and taxes of the defendants with a view to assigning to the particular traffic now under consideration a definite proportion of those expenses as a factor for fixing a reasonable rate. We are left by both parties to arrive at a conclusion as to the reasonableness of the rate complained of solely, as counsel for the complainant puts it, by the exercise of our judgment, enlightened by experience and by such evidence as the parties have adduced that tends to aid us. This evidence consists almost entirely of a comparison of the rate attacked with other rates."

The Commission, of course, will consider in the first place whether or not the carrier, in fixing the rate in question, has given proper weight to the considerations discussed in the two preceding chapters. In Re Proposed Advances in Freight Rates,[4] Commissioner Prouty said:

"Every question as to the reasonableness of a rate may present itself in two aspects. First, is the rate reasonable estimated by the cost and value of the service, and as compared with other commodities; second, is it reasonable in the absolute, regarded more nearly as a tax laid upon the people who ultimately pay that rate."

In I. C. C. *v.* Southern Ry Co.,[5] McDowell, D. J., said:

"Whether or not the Danville rates are reasonable *per se* is a question which has given me no small amount of trouble. . . . The criteria to which I think the greatest weight should be given are as follows: The opinions of expert witnesses; the effect of the present rates on the growth and prosperity of Danville; the cost of transportation as compared with the rates charged; and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at Danville."

81. Effect of Proposed Order—Elaborate System of Rates will not be Disturbed Unless Clearly Necessary.

The probable ultimate effect of making the changes in rates asked for, not only on the business of the shipper or locality in question, but on other merchants and on the surrounding localities,

(4) 9 I. C. C. Rep. 382, 401, (313).

(5) 117 Fed. 741, 744 (277-C).

is most important.[6] Thus, where the granting of the relief prayed for will require the alteration of an elaborate system of rates over a large territory, and thus bring confusion in the adjustment of trade relations formed with reference to the previously established rates, the Commission and the Courts will be very slow to introduce radical changes, regarding it rather to the interest of shippers as a whole that minor abuses be adjusted gradually by the carriers themselves under the influence of publicity and public opinion, than that the community be subjected to the numerous hardships which such changes in an elaborate rate system, evolved during a considerable period of time, inevitably produce.[7]

So, also, where the rate in question is one on a staple commodity, in which there are very large shipments, any change in the rate is regarded as a most serious question, and will not be undertaken by the Commission except on satisfactory proof of its necessity. It is not sufficient to show that existing conditions are not ideal; the complainant must in addition, with reasonable cer-

(6) Dallas Freight Bur. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 427, 432-433, (529).

(7) Lincoln Bd. of Tr. v. Missouri Pac. R. Co., 2 I. C. C. Rep. 155, 160, (56).

Detroit Bd. of Tr. v. Grand Tr. R. Co., et al., 2 I. C. C. Rep. 315, 322-323, (62).

Rice, et al. v. Western N. Y. & P. R. Co., 2 I. C. C. Rep. 389, 397, (67).

Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 483, (200).

Wichita v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 534, 552, (322).

Paper Mills Co. v. Penna. R. Co., 12 I. C. C. Rep. 438, 445, (534).

Fellows Coal, etc. Co. v. Missouri Pac. R. Co., 12 I. C. C. Rep. 481, 482-483, (544).

See also Dallas Ft. Bur. v. Texas & Pac. R. Co., 8 I. C. C. Rep. 33, 44-45, (256).

Hastings Malt Co. v. Chicago, M. & St. P. R. Co., 11 I. C. C. Rep. 675, 682, (438).

Union Sp. Com. Asso. v. Central of Ga. Co., 12 I. C. C. Rep. 375, (522). And infra, §§85-88.

In National Lumb. D. Asso. v. Atlantic C. L. R. Co., 14 I. C. C. Rep. 154, 163, (678), Knapp, Ch., said:

"In administering the statute it is manifestly unwise to interfere with established uses unless they plainly offend its provisions and in a substantial manner abridge the rights it was designed to protect."

tainty, suggest some practicable method of producing better results.[8]

82. Same Subject—Creation of Causes of Complaint on the Part of Other Shippers.

The fact that the reduction of a rate at a complaining point will create a seeming preference in favor of that point as against neighboring localities, and thus give rise to complaints on their part, will deter the Commission from granting the relief unless justice clearly requires it;[9] but in a case where relief is clearly necessary it will be granted in spite of elaborate changes which will become necessary. In such a case Commissioner Clements said:

"It certainly cannot be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction as to other localities."[10]

In East Tenn. V. G. R. Co. v. I. C. C.,[11] Judge Taft said:

(8) Grain Shippers' Asso. v. Illinois Cent. R. Co., 8 I. C. C. Rep. 158, 175-176, (**263**).

Cf. also National Petroleum Asso. v. Ann Arbor R. Co., 14 I. C. C. Rep. 272, (**692**).

(9) Danville v. Southern R. Co., 8 I. C. C. Rep. 409, 431, (**277-A**). See also other cases supra, note 7.

It does not always follow that the surrounding localities will have cause of complaint.

See Danville v. Southern Ry. Co., 8 I. C. C. Rep. 571, (**277-B**).

The Commission has said that it will not correct one violation of the Act by compelling another.

Thatcher v. Delaware & H. Canal Co., 1 I. C. C. Rep. 152, 156, (**22**).

Harwell v. Columbus & W. R. Co., 1 I. C. C. Rep. 236, 250, (**31**).

Compare Southern Pac. R. Co. v. I. C. C., 200 U. S. 536, 553; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302-E**), where the Supreme Court held that although a rule or practice of a carrier clearly violating one section of the Act was not rendered valid because it was adopted to prevent a violation of another Section, yet the Court would not interpret it as violating any part of the Act, unless such was clearly its necessary effect.

(10) Troy Bd. of Tr. v. Alabama Mid. R. Co., 6 I. C. C. Rep. 1, 34, (**170-A**).

Cincinnati Frt. Bur. v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 252, (**183-A**).

Southwestern Kas. Farmers' League v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 530, 534, (**555**).

Reynolds v. Southern Exp. Co., 13 I. C. C. Rep. 536, 540, (**640**).

(11) 99 Fed. 52, 63-4, (**162-C**).

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole Southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her shown in the diagram; and that her rates have been the key to the Southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination in that the interstate commerce act was passed." [12]

Where one railroad controls the entire system over which the changes in question are required, the difficulty of adjustment of rates is not so important.[13]

83. Effect of Proposed Order on Revenue of Carriers.

In considering the advisability of reducing a given rate or schedule, the Commission also gives weight to the probable effect of the reduction on the revenue of the carrier. Where the granting of the relief prayed for will deplete the earnings of the road to a great degree, the Commission will be slow to make the order.[14]

84. History of the Origin of the Rate or System of Rates in Question.

Although the history of the growth of the rates or rate relation at issue in a given case is often instructive, yet, as the Commission has said, what it is concerned with is the reasonableness or justice of the rate in question under the conditions existing

(12) As this decision by the Circuit Court of Appeals was reversed by the Supreme Court in 181 U. S. 1, the above dictum loses some of the weight which it might otherwise have.

(13) National Lumb. D. Asso. v. Norfolk & West. R. Co., 9 I. C. C. Rep. 87, 116-117, (297).

(14) New Orleans Cot. Ex. v. Cincinnati, N. O. & T. P. R. Co., et al., 2 I. C. C. Rep. 375, 388, (66).

Danville v. Southern Ry. Co., 8 I. C. C. Rep. 571, 583-584, (277-B).

Johnson v. Chicago, St. P. M. & O. R. Co., 9 I. C. C. Rep. 221, 243, (305).

Re Rates from St. Louis to Texas, 11 I. C. C. Rep. 238, 274-6, (397).

See also Calloway v. Louisville & N. R. Co., 7 I. C. C. Rep. 431, 456, (242-A).

See also cases supra, §56 et seq.

at the time of the complaint.[15] What the Commission desires to procure is a remedy and not merely an explanation.[16] As said in another case, rates once properly adjusted may, by reason of the building of new lines of road, etc., become improper at a subsequent time.[17]

85. Voluntary Continuance by Carriers of a Given Rate for a Long Period.

In Holmes & Co. *v.* Southern Ry. Co.,[18] Commissioner Prouty said:

"The continuance of a given rate is not conclusive evidence of the reasonableness of that rate, but when a railway company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company which tends to show the unreasonableness of the advance."

In another case[19] the same Commissioner again said:

"These rates were the product of what may be termed normal competition acting through a long series of years which is, perhaps, where such competition has actually existed, as fair a test of a reasonable rate as can be applied under the present state of the law."

In Florida R. Com. *v.* Savannah, Fl. & W. R. Co.,[20] the Commission said:

"The fact that the rates immediately preceding the advance had for the most part continued in force for about four years, unless a satisfactory explanation is made of the long acquiescence of the carriers therein, raises a presumption that they were reasonable—at least, so far as the carriers are concerned. (In Re

(15) Cordele Machine Co. v. Louisville & N. R. Co., 6 I. C. C. Rep. 361, 370-371, (198).

And cf. Indep. Ref. Asso. v. Western N. Y. & P. R. Co., 6 I. C. C. Rep. 378, 383, (155-C).

Anthony Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 605, 608, (650).

(16) Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 9, (46).

(17) Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 479-80, (200).

(18) 8 I. C. C. Rep. 561, 568, (284).

(19) Re Rates from St. Louis to Texas, 11 I. C. C. Rep. 238, 269, (397).

(20) 5 I. C. C. Rep. 13, 40-41, (137).

Rates on Food Products, 4 I. C. C. Rep. 48; 3 Inters. Com. Rep., 93.) . . . . Carriers making an advance in rates should be able to present a satisfactory justification of such advance, particularly when the old rates have been of many years' standing and the advance is great, ... and the traffic affected is of large and constantly increasing volume and of vital importance to a large section of country."[21]

The advance by carriers of long standing rates on important commodities without apparent reason is sufficient to warrant the Commission in undertaking on its own motion an investigation of the reasonableness of such advances.[22]

In I. C. C. *v.* Chicago G. W. R. Co.,[23] Mr. Justice Brewer said in the course of the opinion:

(21) Proctor & Gamble v. Cincinnati, H. & D. R. Co., 4 I. C. C. Rep. 87, 102, (**109**).

Coxe Bros. v. Lehigh Val. R. Co., 4 I. C. C. Rep. 535, 582-3, (**124-A**).

Re Export and Domestic Rates, 8 I. C. C. Rep. 214, 269, (**265**).

National Hay Asso. v. Lake Shore & M. S. R. Co., 9 I. C. C. Rep. 264, 305, (**309-A**).

Wichita v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 534, 552, (**322**).

Central Yel. Pine Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 535, 542, (**369-A**).

Tift v. Southern Ry. Co., 10 I. C. C. Rep. 548, 581, (**370**).

Banner Milling Co. v. New York Cent. & H. R. R. Co., 13 I. C. C. Rep. 31, 34, (**567**).

Detroit Chem. Works v. Northern Cent. R. Co., 13 I. C. C. Rep. 357, 362, (**620**).

Burgess v. Transcontinental Fr. Bur. 13 I. C. C. Rep. 668, 677, (**659**).

Cf. Detroit G. H. & M. R. Co. v. I. C. C., 74 Fed. 803, 823; 43 U. S. App. 308; 21 C. C. A. Rep. 103, (**100-C**).

(22) Re Proposed Advances in Fr't. Rates, 9 I. C. C. Rep. 382, 437, (**313**).

Re Rates from St. Louis to Texas, 11 I. C. C. Rep. 238, (**397**).

(23) 209 U. S. 108, 119; 52 L. Ed. 268; 28 Sup. Ct. 493, (**364-C**).

See also Oregon & W. Lumber Asso. v. Union Pac. R. Co., 14 I. C. C. Rep. 1, 13, (**661**).

Pacific Coast Lumber Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 23, 38-39, (**664**).

Potlatch Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 41, (**665**).

Western Or. Co. v. Southern Pac. R. Co., 14 I. C. C. Rep. 61, 72, 74, (**667**).

In Banner Milling Co. v. New York Cent. & H. R. R. Co., 14 I. C. C. Rep. 398, 408, (**567**), Prouty, C., said:

"Railways are authorized to establish, in the first instance, their

"It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers."

86. Same Subject—Circumstances Justifying Advance of Long Standing Rates.

The so-called presumption of reasonableness arising from the long continuance of a rate is, of course, not irrebuttable. "If it were," as said by Commissioner Prouty,[24] "the carriers could never change their tariffs or their classifications."[25] Thus where it appears that in order to encourage a new industry the rate in

transportation charges, and the presumption of right doing attaches to their acts in the establishment of those rates. No presumption of law against a particular rate springs from the fact that the rate in question was an advance over some previous rate. The burden of proof is always upon the party who attacks an existing rate. The circumstance that the railway has for a series of years maintained a lower rate or a different relation of rates is an evidentiary fact which may be introduced and considered like any other fact. It is in the nature of an admission upon the part of the railway that the rate maintained was at the time a just and reasonable one. The force of this admission may be entirely overcome by showing the circumstances under which the rate was established and maintained, or a change in conditions, but, certainly, it would be a most peculiar rule of law which required this Commission in passing upon the reasonableness of a rate to entirely disregard the history of that rate and its relation to every other rate. To so hold would be in substance to say that the conduct and admission of parties can not be used in evidence."

(24) Re Export and Domestic Rates, 8 I. C. C. Rep. 214, 270, (**265**).

(25) See also Providence Coal Co. v. Providence & W. R. Co., 1 I. C. C. Rep. 107, 122, (**17**).
Warren Mfg. Co. v. Southern R. Co., 12 I. C. C. Rep. 381, 387, (**523**).
Quimby v. Clyde S. S. Co., 12 I. C. C. Rep. 392, 396, (**525**).

question was originally made very low, it may properly be raised as the industry grows stronger.[26]

Where the rates long continued have not been voluntarily put in force by the carrier but in compliance with the order of the Commission, the so-called presumption does not apply;[27] nor does it apply to the long maintenance of mere paper rates under which no goods were ever shipped;[28] nor where there is an advance in the actual rate charged, resulting from adherence to the published tariff, concessions therefrom having been habitually granted in the past.[29]

The conditions existing at the time of the enforcement of the rates relied on must be shown, or little weight will be attached to their voluntary observance by the carrier, especially where it appears that these rates were discontinued some years before the filing of the complaint.[30]

(26) Re Proposed Adv. in Frt. Rates, 9 I. C. C. Rep. 382, 406-407, 439, (**313**).

See also Knapp, C., (dissenting) in Consolidated F'w'd'g'. Co. v. Southern Pac. R. Co., 10 I. C. C. Rep. 590, 623, (**371**).

Similarly, a railroad which permits the loading of coal from wagons when the traffic is small is not thereby estopped from subsequently putting in force a rule insisting on loading from tipples only.

Harp v. Choctaw O. & G. R. Co., 118 Fed. 169, (**308**-A); 125 Fed. 445, 450-1; 61 C. C. A. 405, (**308**-B).

See also Sidman v. Richmond & D. R. Co., 3 I. C. C. Rep, 512, 516-7, (**94**).

(27) Proctor v. Cincinnati, H. & D. R. Co., 9 I. C. C. Rep. 440, 488-9, (**314**-A).

See also Evans v. Union Pac. R. Co., 6 I. C. C. Rep. 520, 547, (**203**).

(28) Shiel & Co. v. Illinois Cent. R. Co., et al., 12 I. C. C. Rep. 210, 214, (**498**).

See also Bovaird Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 56, 61, (**576**).

(29) Re Proposed Adv. in Frt. Rates, 9 I. C. C. Rep. 382, 389, 439, (**313**).

Frye v. Northern Pac. R. Co., 13 I. C. C. Rep. 501, 506-7, (**635**).

Bannon v. Southern Exp. Co., 13 I. C. C. Rep. 516, (**637**).

(30) Enterprise Mfg. Co. v. Georgia R. Co., 12 I. C. C. Rep. 130, (**480**).

Similarly a comparison with rates in force prior to 1887 has been held to be of little or no value.

Fulton v. Chicago, St. P. M. & O. R. Co., 1 I. C. C. Rep. 104, (**16**).

Harding v. Same, 1 I. C. C. Rep. 104, (**16**).

Myers v. Pennsylvania Co., 2 I. C. C. Rep. 573, (**72**).

87. Voluntary Reduction of Rate not a Conclusive Admission of Prior Unreasonableness.

The reduction by a railroad of a given rate does not amount to a conclusive admission on its part that the rate previously in force was unreasonable.[31] In Holmes & Co. *v.* Southern Ry. Co.,[32] Commissioner Prouty said:

"The action of a railway company in reducing a rate upon complaint of a shipper is not conclusive evidence that the rate was unreasonable before the reduction, but when the traffic manager of that company, after a careful examination of the facts, makes a reduction, that, too, is in the nature of an admission against the reasonableness of the obnoxious rate at the time of the reduction." [33]

Where, however, a long standing rate was raised and the advanced rate kept in force for two months and then the former rate restored, the Commission held that this was in nature of an admission that the former rate was a reasonable one, throwing on the carrier the burden of explaining it. In the absence of a satisfactory explanation the Commission awarded reparation to the amount of the advance.[34]

(31) Leonard v. Chicago, M. & St. P. R. Co., 12 I. C. C. Rep. 492, 494, (548).

Loud v. South Car. R. Co., 5 I. C. C. Rep. 529, 544, (161).

Ottumwa Co. v. Chicago, M. & St. P. R. Co., 14 I. C. C. Rep. 121, 125, (674).

In the case last cited, Clark, C., said:

"We are unwilling to subscribe to the theory that the voluntary reduction of a rate by a carrier conclusively shows that the former rate was unjust and unreasonable, and that reparation should be granted on all shipments moving thereunder within the period of the Statute of Limitations."

Similarly it is not enough to entitle a complainant to reparation to show that since certain shipments were made a joint through rate has been established which is lower than the former combination of locals. The Commission has said that this fact of itself creates no presumption against the carriers.

Flaccus Co. v. Cleveland, C. C. & St. L. R. Co., 14 I. C. C. Rep. 333, (669); but see infra, §99.

(32) 8 I. C. C. Rep. 561, 568, (284).

(33) See also infra, §310, as to practice where the carrier admits the previous unreasonableness of the rates reduced.

(34) Ocheltree Co. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 46, (574).

88. Investment of Capital by Shippers in Reliance on Continuance of Rates in Question.

As noted above, the Commission is slow to change a long continued rate or rate relation to which business conditions have adapted themselves, and will not ordinarily do so unless justice clearly requires it. On the same principle, the fact that industries have been built up in reliance on the continuance of a certain rate or rate relation will influence the Commission in preventing the carrier from increasing the rate,[35] or from disturbing the relation.[36] But as said by Commissioner Veazey,[37] "Of course this Commission would not hold that a classification that was wrong should be adhered to, although its change might work injury to individuals whom the wrong classification had unduly favored." [38]

89. The Commission will not Make an Order Tending to Equalize Natural Advantages.[39]

The attitude of the Commission has all along been that a shipper is entitled to the benefits of the natural advantages incident to his location. This attitude was especially pronounced during the first years after the Commission's organization. It then held that carriers were not justified, under stress of commercial or market competition, in equalizing such advantages by giving to

(35) Bates v. Penna. R. Co., 3 I. C. C. Rep. 435, (89-A).
See also New Albany Co. v. Mobile, J. & K. C. R. Co., 13 I. C. C. Rep. 594, (648).
Oregon & W. L. Co. v. Union Pac. R. Co., 14 I. C. C. Rep. 1, (661).
Pacific Coast Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 23, (664).
Potlatch Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 41, (665).
Western Or. Co. v. Southern Pac. R. Co., 14 I. C. C. Rep. 61, 72, 74, (667).

(36) Howard Mills Co. v. Missouri Pac. R. Co., 12 I. C. C. Rep. 258, 263, (508).

(37) Bates v. Penn. R. Co., 3 I. C. C. Rep. 435, 444, (89-A).

(38) See also Potter Mfg. Co. v. Chicago & G. T. R. Co., 5 I. C. C. Rep. 514, 520-1, (160).
Chicago Bd. of Tr. v. Chicago & A. R. Co,, 4 I. C. C. Rep. 158, 191, (112).
Buchanan v. Northern Pac. R. Co., 5 I. C. C. Rep. 7, (136).
Strough v. New York Cent. & H. R. R. Co., 87 N. Y. Supp. 30; 92 App. Div. 584, (1904).
Quimby v. Clyde S. S. Co., 12 I. C. C. Rep. 392, 396, (525).

(39) See also supra, §§56-58, 74-75.

distant or disadvantageously situated localities rates low enough to enable them to compete with their better located competitors. Thus in Eau Claire B'd of Tr. *v.* Chicago, M. & St. P. R. Co.,[40] Commissioner Knapp said:

"That rates should be fixed in inverse proportion to the natural advantages of competing towns with a view to equalizing commercial conditions, as they are sometimes described, is a proposition unsupported by law, and quite at variance with every consideration of justice."

In Cincinnati Fr. Bur. *v.* Cincinnati, N. O. & T. P. R. Co.,[41] Commissioner Prouty said:

"A city is entitled to the benefit of its location. The fact that it enjoys exceptional advantages in one respect is no reason why it should be subjected to discrimination in some other respects."[42]

(40) 5 I. C. C. Rep. 264, 293, (**151**).

(41) 7 I. C. C. Rep. 180, 189, (**221**).

(42) Similar expressions are found in the following cases:

Rend v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 540, 552, (**69**).

Squire & Co. v. Michigan Cent. R. Co., 4 I. C. C. Rep. 611, 625, (**126**).

Hezel Milling Co. v. St. L., A. & T. H. R. Co., 5 I. C. C. Rep. 57, (**140**).

Anthony Salt Co. v. Missouri Pac. R. Co., 5 I. C. C. Rep. 299, 312, (**153**).

Minneapolis Ch. of Com. v. Great Nor. R. Co., et al., 5 I. C. C. Rep. 571, 592-593, (**163**).

James v. Canadian Pac. R. Co., et al., 5 I. C. C. Rep. 612, 627, (**165**).

Newland v. Northern Pac. R. Co., 6 I. C. C. Rep. 131, 145, (**179**).

Cincinnati Frt. Bur. v. Cincinnati N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 245, (**183-A**).

Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 473, (**200**).

Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 513, (**201-A**).

Omaha Com. Cl. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 674-675, (**212**).

Milk Prod. Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, (**220**).

Omaha Com. Cl. v. Chicago & N. W. R. Co., 7 I. C. C. Rep. 386, 405, (**240**).

Brockway v. Ulster & D. R. Co., 8 I. C. C. Rep. 21, (**255**).

Listman Milling Co. v. Chicago, M. & St. P. R. Co., 8 I. C. C. Rep. 47, 67, (**257**).

In a few of its early decisions, however, the Commission approved the equalization of natural advantages by carriers.

See Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 141, (**111**).

Kauffman Co. v. Missouri Pac. R. Co., 4 I. C. C. Rep. 417, (**121**).

Since the decisions by the Supreme Court holding that commercial or market competition is a sufficient justification for a preference by a carrier or for an exception to Section 4 of the Act,[43] the Commission has of course recognized that a carrier may to a certain extent equalize natural advantages by giving exceptionally low rates to localities at a distance from the market in question, or to points possessing natural advantages so inferior as to prevent their competing with more fortunate rivals unless given an advantage in rates. Where, however, the carrier does not see fit to equalize advantages and thus enable the poorly situated merchant to ship, the Commission still refuses to compel it to do so, and encourages carriers to recognize natural advantages.[44]

The Federal Courts have recognized that carriers should not arbitrarily deprive shippers of their natural advantages[45] but

Savannah Frt. Bur. v. Louisville & N. R. Co., 8 I. C. C. 377, 407, (**275**-A).

It has always permitted grouping of localities for rate making purposes, within reasonable limits.

See supra, §§59-60.

(43) See supra, §§76-79, and infra, Chap. XVII, §§199-200.

(44) Holdzkom v. Michigan Cent. R. Co., 9 I. C. C. Rep. 42, 54, (**292**).

Wichita v. Missouri Pac. R. Co., 10 I. C. C. Rep. 35, 40, (**336**).

Re Transportation of Salt, 10 I. C. C. Rep. 148, 170-171, (**342**).

Lehmann v. Atchison, T. & S. F. R. Co., 10 I. C. C. Rep. 460, 469, (**366**).

Cannon Falls F. E. Co. v. Chicago G. W. R. Co., 10 I. C. C. Rep. 650, 658, (**374**).

Re Rates on Corn, 11 I. C. C. Rep. 212, 217, (**394**).

Howard Mills Co. v. Missouri Pac. R. Co., 12 I. C. C. Rep. 258, 261, (**508**).

Enterprise Mfg. Co. v. Georgia R. Co. et al., 12 I. C. C. Rep. 451, 456, (**536**).

Bovaird Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 56, 66, (**576**).

Quimby v. Maine Cent. R. Co., 13 I. C. C. Rep. 246, 248, (**605**).

Cf. Potlatch Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 41, 46, (**665**).

But see Georges Creek Coal Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 127, (**675**).

(45) See Brewer v. Central of Ga. R. Co., 84 Fed. 258, 268, (**229**-B).

I. C. C. v. Western & A. R. Co., 88 Fed. 186, 193, (**154**-B).

have differed from the original rulings of the Commission as to what constitute such advantages, holding that the competition of carriers is a natural advantage to the shipper at the competitive point, from which he may properly benefit by the low rates resulting therefrom, and that the competition of rival markets is a circumstance which justifies the carrier in giving a poorly situated shipper such a rate as to enable him to compete with his better located competitors.[46]

90. Comparison of Rates.

(As to comparison of rates previously in force, see supra, §§85-87).

One of the aids most relied on, especially by the Commission, in passing on the reasonableness of rates, is a comparison of the rate or rates in question with other rates on the same or similar or on different commodities, over the defendant's line, or on other roads. The weight to be attached to the comparison depends, of course, upon the degree of similarity between the rate to be passed on and that used as a basis of comparison.[47] Thus, but little weight can be attached to a comparison of a given rate with rates over a road required by its charter to maintain those rates.[48] The Commission has held, however, that a rate fixed by its order as fair a subject of comparison as one voluntarily put in force by the carrier.[49]

(46) See infra, Chap. XVII.

And see also Payne-Gardner Co. v. Louisville & N. R. Co., 13 I. C. C. Rep. 638, 643, (**655**).

(47) I. C. C. v. East Tenn., V. & G. R. Co., 85 Fed. 107, 114, (**162**-B).

I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, 621-622, (**275**-B).

Frye v. Northern Pac. R. Co., 13 I. C. C. Rep. 501, 508, (**635**), (see quotation supra, §80).

Kansas City Co. v. Chicago, R. I. & P. R. Co., 14 I. C. C. Rep. 468, 471-472, (**709**).

In case of rates of express companies, where by reason of the small investment required it is impossible to test rates by the amount of return on capital, the comparison of rates is practically the only test. There is also less variation in conditions governing the express traffic in different localities than in case of freight, thus making the comparison of express rates more valuable and reliable.

Kindel v. Adams Express Co., 13 I. C. C. Rep. 475, (**634**).

(48) Johnston v. St. Louis & S. F. R. Co., et al., 12 I. C. C. Rep. 73, 75, 77, (**469**).

Cf. also cases infra, §99n.(89).

(49) Davenport v. Southern Ry. Co., 11 I. C. C. Rep. 650, 657, (**435**).

91. Same Subject—Distinction Between Cases of Reasonable Rates and Those Involving Questions of Preference or Discrimination.

In considering decisions discussing the relative weight to be given to the comparison of rates,—as, indeed, in reference to almost all questions arising under this Act,—an important distinction must be kept in mind. This is the distinction between cases involving discrimination or preference and cases of unreasonable rates. In both, comparison of rates is valuable, but in the former it is more than this; it is essential. In cases of preference or discrimination, the comparison of rates is what produces the illegality, while in cases of reasonableness *per se* it merely tends to show it.

It is impossible to draw any well defined line between the two classes of cases, since every case of preference or discrimination involves also one of relative reasonableness,[50] and since there are practically very few cases of pure unreasonableness *per se,* involving comparison with rates on strictly non-competitive commodities.[51] The point to which attention is called, however, is that in cases where the commodities whose rates are the subject of comparison are competitive, there is present the element of preference or discrimination in addition to that of simple unreasonableness. Even though the case be one where the complaint is solely of unreasonableness, the result of the comparison of rates on competitive commodities will be given greater weight than where they do not compete, since the carrier's duty to make reasonable relative rates is, of course, stricter in the case of competitive than in case of non-competitive commodities.[52]

(50) Re Chicago, St. Paul & K. C. R. Co., 2 I. C. C. Rep. 231, 265, (58).

Murray v. Chicago & N. W. R. Co., 62 Fed. 24, (1894); (92 Fed. 868; 35 C. C. A. 62), (1899).

U. S. v. Chicago & A. R. Co., 148 Fed. 646, 648, (430-A).

(51) See supra, §§49-50.

(52) See Harvard Co. v. Penna. Co., 4 I. C. C. Rep. 212, 222-223, (114).

See also I. C. C. v. Cincinnati, H. & D. R. Co., 146 Fed. 559, 561-562, (314-B).

92. Same Subject—Presumption of Reasonableness of Rates—Burden of Proof.

The duty and power of fixing rates rests in the first instance with the carriers; they are entitled to impose such rates as will maintain their properties in condition properly to discharge their public duties and to yield a fair return to their owners. The men who determine the rates are experts and it is to the ultimate interest of the carrier, as well as of the shippers and the general public, that all rates should be reasonable and fairly adjusted. Rates fixed by the carriers are presumed to be proper and reasonable, and the burden is on one who wishes to show that they are otherwise.[53]

This presumption would seem properly to extend not only to the reasonableness of the rate in the absolute, but also to its relative reasonableness, as compared with other rates on the same or on other lines of road. If this be true, a mere comparison of rates would not, of itself, be sufficient in any case to establish the unreasonableness of a given charge. Of course in a very flagrant case a rate might be held to be unreasonable or unduly preferential merely by comparison with other rates,[54] but such a rate would probably be the result of a mistake on the part of the carrier, which it would rectify on its being called to its attention.

The Commission, on a number of occasions, has mentioned certain relations of rates, such as a through rate greater than the sum of locals composing it, or a rate to a near point greater than that to a more distant point on the same line, which it said threw on the carrier the burden of justifying the seeming discrepancy.[55]

(53) I. C. C. v. Chicago G. W. R. Co., 209 U. S. 108, 119; 52 L. Ed. 268; 28 Sup. Ct. 493, (**364**-C).

Fulton v. Chicago, St. P. M. & O. R. Co., 1 I. C. C. Rep. 104, 106, (**16**).

Lincoln Creamery v. Union Pac. R. Co., 5 I. C. C. Rep. 156, 160, (**145**).

Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep. 224, 234, (**229**-A).

Wichita v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 534, 553, (**322**).

Banner Milling Co. v. New York C. & H. R. R. Co., 14 I. C. C. Rep. 398, 408, (**567**).

But see McMorran v. Grand Tr. R. of Can., 3 I. C. C. Rep. 252, 261, (**86**).

(54) See McMorran v. Grand T. R. of Can., 3 I. C. C. Rep. 252, 261, (**86**).

(55) See infra, §99.

But in spite of this, as a practical matter the Commission very rarely declares a rate unreasonable merely by a comparison of tariffs or balancing of rates, without evidence of the cost or value of the service, or of the effect of the rate on the community interested in it.[56]

It would be useless to attempt to enumerate or classify all the instances in which evidence has been offered before the Commission, or before the Courts, of other rates, as bearing on the reasonableness of that under consideration. With the foregoing general statement, it is proposed to take up only the cases in which the propriety of a comparison of certain kinds of rates or the proper weight to be given thereto has been distinctly defined.

93. Same Subject—Rates on Other Commodities Between the Same Points.

Evidence of this kind is considered in practically every case, and requires no comment. Its weight depends, of course, on the

(56) Raymond v. Chicago, M. & S. P. R. Co., 1 I. C. C. Rep. 230, (30).

Spartanburg Bd. of Tr. v. Richmond & D. R. Co., 2 I. C. C. Rep. 304, 306, (61).

Rend v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 540, 551, (69).

Lincoln Creamery v. Union Pac. R. Co., 5 I. C. C. Rep. 156, 160, (145).

Independent Ref. Asso. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 448, (155-A).

Gustin v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 277, 289, (266).

Holdzkom v. Michigan Cent. R. Co., 9 I. C. C. Rep. 42, 58, (292).

Dallas Frt. Bur. v. Austin & N. W. R. Co., 9 I. C. C. Rep. 68, 77, (295).

Phoenix Shippers Un. v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 250, 263, (306).

Wichita v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 534, 553, (322).

Chattanooga Ch. of Com. v. Southern R. Co., 10 I. C. C. Rep. 111, 137, (341).

Koch v. Penna. R. Co., 10 I. C. C. Rep. 675, 683, (377).

Dallas Frt. Bur. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 427, 433, (529).

I. C. C. v. Nashville, C. & St. L. R. Co., 120 Fed. 934; 57 C. C. A. 224, (281-B).

But see Cincinnati Frt. Bur. v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 236-7, (183-A), and cases cited.

Also Southern Groc. Co. v. Georgia Nor. R. Co., et al., 12 I. C. C. Rep. 229, (502).

similarity of the service rendered in connection with the two rates.[57]

94. Same Subject—Rates Between Different Points on the Same Road.

In a number of instances the Commission had said that where, in fixing rates, a carrier departs from a mileage basis, the burden is on it to justify such departure.

In Logan *v.* Chicago & N. W. R. Co.,[58] Commissioner Morrison said:

"A departure from the equal mileage rates as applied to the several branches of a road or system of roads is not conclusive of the unlawfulness of rates, but the company making such departure should have satisfactory reasons for such variance of rates and should show them to be reasonable when disputed. This burden is by the Act to Regulate Commerce put on carriers when they 'charge or receive as great compensation for a shorter as for a longer distance.' The same burden is on a company making greater charge for one of two hauls of equal distance."[59]

These and similar expressions must, like many other general expressions by the Commission, be read in connection with the case then under discussion. As above noted, the Commission would probably not order a given rate reduced or award reparation on account of its exaction, merely on proof of a lower rate on the same or on a similar commodity over another part of the line, even where the latter rate was for the same distance. Questions of the reasonableness of rates depend on too many varying and practical considerations to be subject to exact and definite standards or to be dependent on mere legal presumptions. In a number of instances in which the Commission has attempted to

(57) Perry v. Florida Cent. & P. R. Co., 5 I. C. C. Rep. 97, 112-115, (142).

Rice v. Cincinnati, W. & B. R. Co., 5 I. C. C. Rep. 193, 228-229, (147), etc.

Anthony v. Phila. & R. R. Co., 14 I. C. C. Rep. 581, (722).

Rates between two points need not be the same the year round. Thus rates on coal may be higher in winter than in summer.

I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 426-427, (156-B).

(58) 2 I. C. C. Rep. 604, 612, (75).

(59) McMorran v. Grand Tr. R. of Can., 3 I. C. C. Rep. 252, 261, (86).

James v. Canadian Pac. R. Co., 5 I. C. C. Rep. 612, 628, (165).

Cincinnati Frt. Bur. v. Cincinnati N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 236-237, (183-A).

prescribe general rules, such as that above quoted, it has led itself into subsequent inconsistencies which it is impossible wholly to reconcile. All that the cases above quoted can fairly be said to be authority for, is that where all the apparent conditions surrounding two hauls are the same, the carrier is expected to explain any difference in rates charged for each.[60]

Although the rates in force over other branches of defendant's road have a bearing upon and are entitled to consideration in connection with the question of reasonable charges under like conditions,[61] rates over such different branches need not, of course, be the same where the conditions are different. So, also, east- and west-bound rates between the same points need not be the same where different factors enter into the determination of each,[62] and rates over two different routes need not be identical, where one route is much longer than the other.[63]

95. Same Subject—Rates Over Other Lines.

Although, in determining the reasonableness of given rates, it is competent to compare rates over other lines with those in question,[64] this is by no means a conclusive test,[65] and such compari-

(60) See also supra, §§58-60.

(61) Morrell v. Union Pac. R. Co., 6 I. C. C. Rep. 121, 129, (**176**).

(62) Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 103, (**173**).
MacLoon v. Boston & M. R. Co., 9 I. C. C. Rep. 642, (**330**).
Hewins v. New York, N. H. & H. R. Co., 10 I. C. C. Rep. 221, (**346**).
Weil Bros. v. Penna. R. Co., 11 I. C. C. Rep. 627, (**432**).
Phillips v. Grand Tr. W. R. Co., 11 I. C. C. Rep. 659, (**436**).
Menasha Wood Ware Co. v. Atchison, T. & S. R. Co., 11 I. C. C. Rep. 666, (**437**).
Omaha Gr. Exch. v. Union Pac. R. Co., 12 I. C. C. Rep. 65, (**466**).
Burgess v. Transcontinental Fr. Bur., 13 I. C. C. Rep. 668, 675, (**659**).
Allen v. Oregon R. & Nav. Co., 106 Fed. 265, (1901).
I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, 623, (**275-B**).

(63) Admin. Rul. No. 92, (June 29, 1908).
See also infra, n. 69.

(64) Minnesota Bus. Men's Asso. v. Chicago, St. P., M. & O. R. Co., 2 I. C. C. Rep. 52, 69-70, (**48**).
Rau v. Penna. R. Co., 12 I. C. C. Rep. 199, (**496**).
Dallas Fr. Bur. v. Gulf C. & S. F. R. Co., et al., 12 I. C. C. Rep. 223, 226, (**501**).
Detroit Chem. Wks. v. Northern Cent. R. Co., 13 I. C. C. Rep. 357, 361, (**620**).

(65) Cannon v. Mobile & O. R. Co., 11 I. C. C. Rep. 537, 542-543, (**418**).

sons are of little or no weight unless substantial similarity of conditions in the two cases be shown.[66]

Rates on a particular commodity over a road constructed expressly to haul that commodity are not to be judged by comparison with rates over other lines, but rather by the financial returns produced by the traffic in question.[67]

Non-competitive rates cannot fairly be compared with competitive ones.[68] Nor are lower rates between the same points by a shorter line conclusive of unreasonableness.[69]

96. Same Subject—Through and Local Rates[70]—General Considerations to be Borne in Mind in Comparing Such Rates.

In several cases decided by the Circuit Courts during the early '90's, it was said that a joint through rate, made by two or more connecting roads, formed no basis for comparison with the local rates of either road for part of the distance, and that neither was a proper standard by which the reasonableness of the other might be determined.[71]

(66) Evans v. Union Pac. R. Co., 6 I. C. C. Rep. 520, 543, (**203**).

Memphis Frt. Bur. v. Fort Smith & W. R. Co., 13 I. C. C. Rep. 1, 5, (**561**).

Rhinelander Co. v. Northern Pac. R. Co., 13 I. C. C. Rep. 633, 635, (**654**).

(67) American Asphalt Asso. v. Uintah R. Co., 13 I. C. C. Rep. 196, 201, (**598**).

(68) I. C. C. v. Southern R. Co., 117 Fed. 741, (**277**-C).

I. C. C. v. Nashville, C. & St. L. R. Co., 120 Fed. 934; 57 C. C. A. 224, (**281**-B).

(69) Marley v. Norfolk & W. R. Co., 11 I. C. C. Rep. 616, (**427**).

Admin. Rul. No. 92, (June 29, 1908).

Cf. Milwaukee Ch. of Com. v. Chicago, M. & St. P. R. Co., 7 I. C. C. Rep. 481, (**244**).

(70) As to what are considered through and what local rates, see supra, §§29-38, and §§45-47.

(71) Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912; 10 U. S. App. 430; 3 C. C. A. 347, (**138**-C).

Tozer v. U. S., 52 Fed. 917, (**70**-D).

U. S. v. Mellen, 53 Fed. 229, (**158**).

Parsons v. Chicago & N. W. R. Co., 63 Fed. 903; 11 C. C. A. 489; 27 U. S. App. 394, (**188**-A); (affirmed 167 U. S. 447; 42 L. Ed. 232; 17 Sup. Ct. 887), (**188**-B).

See also Southern R. Co. v. St. Louis H. & G. Co., 153 Fed. 728, 734, (**384**-C).

These were all cases arising under Sections 3 and 4 of the Act, where the complaints were based on the fact that the share of one of the roads, party to a joint through rate, for its part of the through haul, was less than its local rate between the same points. That such an arrangement of rates is reasonable and proper has never been doubted either by the Commission or by the Courts, but the dictum of Justice Brewer in the Osborne case to the effect that the Act does not require that joint through rates shall bear any relation whatever to the local rates for a part of the distance which they cover, and that each is entirely independent of the other, is not in accordance with the later decisions.

In passing on questions of reasonableness, absolute and relative, or of preferences between localities and violations of the long and short haul clause, both Courts and the Commission constantly compare through rates with local ones. In so doing, certain differences in the conditions surrounding the two are, of course, to be kept in mind, but the comparison is regarded as often valuable, and in certain cases almost decisive, of the justice of the rates under consideration. Thus, in accordance with the rule that the rate per ton mile should decrease as the distance increases, it is recognized that a joint through rate should ordinarily be less than the sum of the local rates between the intermediate points, and a through rate exceeding the sum of the local rates is considered *prima facie* unreasonable.[72] So, also, a rate for a through haul over two connecting roads is expected to be somewhat higher than a rate between the same points over but one line.[73] All that is meant by the expressions to the effect that through rates are no proper standards by which to test the reasonableness of local ones, is that certain differences in conditions in the two are often so great as to render a comparison between them of little or no value. If, however, these conditions be kept in mind, there is no absolute rule of law preventing a comparison of through and local rates, and in certain cases, both of reasonable-

(72) See infra, §99.

(73) Loup Colliery Co. v. Virginia R. Co., 12 I. C. C. Rep. 471, 478, (541).

Texas Cement Co. v. St. Louis & S. F. R. Co., 12 I. C. C. Rep. 68, 70, (467).

Cedar Rap. R. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 250, 255, (606).

ness and of preference, such a comparison is a most important aid in determining the propriety of the rate or rate relation under consideration.[74]

97. Same Subject—Through Rates Should Normally be Less than Sum of Locals.

The division of a joint through rate received by a carrier, party to it should normally be less than its local rate for its part of the haul,[75] but this rule is not one required by the Act, and is subject to exceptions.[76] The difference between the two must not be unreasonable.[77]

(74) Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 474-478, (**200**), and cases cited.

See also Texas Cement Co. v. St. Louis & S. F. R. Co., 12 I. C. C. Rep. 68, 72, (**467**).

Marten v. Louisville & N. R. Co., 9 I. C. C. Rep. 581, 597, (**325**).

(75) Farrar v. East Tenn., V. & Ga. R. Co., et al., 1 I. C. C. Rep. 480, (**40**).

Detroit Bd. of Tr. v. Grand Tr. Ry. of Can. 2 I. C. C. Rep. 315, 321, (**62**).

New Orleans Cot. Exch. v. Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. Rep. 375, 385, (**66**).

Milwaukee Ch. of Com. v. Flint & P. M. R. Co., 2 I. C. C. Rep. 553, 570, (**71**).

Lippman v. Illinois Cent. R. Co., 2 I. C. C. Rep. 584, (**73**).

New Orleans Cot. Exch. v. Illinois Cent. R. Co., 3 I. C. C. Rep. 534, 559, (**96**).

Poughkeepsie Iron Co. v. New York Cent. & H. R. R. Co., 4 I. C. C. Rep. 195, 207, (**113**).

St. Louis H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 101, (**384-A**).

Moran v. Missouri Pac. R. Co., 11 I. C. C. Rep. 598, (**425**).

Cf. St. Louis H. & G. Co. v. Illinois Cent. R. Co., 11 I. C. C. Rep. 486, (**410**).

See also cases supra, §60.

(76) See supra, §62.

Mankato Mfgrs. Un. v. Minneapolis & St. L. R. Co., 4 I. C. C. Rep. 79, 85, (**107**).

Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 31, (**291**).

Cf. also Minnesota Bus. Men's Asso. v. Chicago, St. P., M. & O. R. Co., 2 I. C. C. Rep. 52, 68 (**48**).

Same v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 73, 85, (**50**).

(77) Lippman v. Illinois Cent. R. Co., 2 I. C. C. Rep. 584, (**73**).

Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 514, (**201-A**).

In view of the fact that in case of through rates the carriers are relieved from a number of terminal expenses at intermediate points, which are included in the sum of the local rates, and also in view of the usual decrease in the rate per ton mile with the increase of the distance, the Commission has always regarded with disfavor joint through rates made by combining locals.

In Hampton Bd. of Tr. *v.* Nashville, C. & St. L. R. Co.,[78] Commissioner Clements said:

"The charge of a local rate for part of a through haul, when the extra expense of a local haul has not been incurred, is *prima facie* excessive."

In Troy Bd. of Tr. *v.* Alabama Mid. R. Co.,[79] the same Commissioner said:

"A local rate which presumably is adopted as covering both the initial and final expenses of the haul, is *prima facie* excessive as part of a through rate over a through line composed of two or more carriers."

98. Same Subject.—Exceptions to Foregoing Rule—Basing Point Rates.

The Commission has always supported the foregoing rule as a general proposition,[80] and the Federal Courts have announced

(78) 8 I. C. C. Rep. 503, 521, (**281**-A).

(79) 6 I. C. C. Rep. 1, 23, (**170**-A).

Commissioner Clements has dissented from the ruling of the other Commissioners in several cases, basing his dissent on the foregoing principle.

See Holdzkom v. Michigan Cent. R. Co., 9 I. C. C. Rep. 42, 59, (**292**).

Red Cloud Mining Co. v. Southern Pac. R. Co., 9 I. C. C. Rep. 216, 220, (**304**).

See also Phoenix Shippers Un. v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 250, 263, (**306**).

(80) Sanger v. Southern Pac. R. Co., 3 I. C. C. Rep. 134, (**81**).

King v. N. Y., N. H. & H. R. Co., 4 I. C. C. Rep. 251, 262, (**116**).

Cincinnati Frt. Bur. v. Cincinnati N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 246, (**183**-A).

Re Illinois Cent. Rates, 6 I. C. C. Rep. 624, 630, (1896).

Gustin v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 277, (**266**).

Danville v. Southern R. Co., 8 I. C. C. Rep. 409, (**277**-A).

Johnson v. Chicago, St. P. M. & O. R. Co., 9 I. C. C. Rep. 221, 244-249, (**305**).

Kindel v. Boston & A. R. Co., 11 I. C. C. Rep. 495, 511, (**412**).

Hoerr v. Chicago, M. & St. P. R. Co., 11 I. C. C. Rep. 547, 553-554, (**419**).

somewhat the same principle.[81] But in many cases, especially since the decisions of the Supreme Court with regard to the effect of railroad and market competition, the Commission has recognized the propriety of such combined rates, where the total through rates are not unreasonable *per se* and where the greater part of the haul is to a competitive point.

In case the through rate to a local point is made by combining not merely the rates to and from an intermediate point, but by a combination on a trade centre beyond the locality complaining, the objection to the combined rate is, of course, strengthened; but even here competition is often held to justify the situation.[82]

In a recent decision the Commission approved a combination joint through rate where over but two roads, the latter of which had but a short haul.[83]

In a number of cases before the Commission prior to the decision by the Supreme Court establishing competition as a proper consideration in determining rates and sanctioning schedules made on the Basing Point System, the Commission held that rates

Durham v Illinois Cent. R. Co., 12 I. C. C. Rep. 37, 39, (**460**).
Laning Co. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 154, (**590**).
Flaccus Co. v. Cleveland C. C. & St. L. R. Co., 14 I. C. C. Rep. 333, (**699**).
Randolph Co. v. Seaboard A. L. R. Co., 14 I. C. C. Rep. 338, (**649**).
But see St. Louis H. & G. Co. v. Illinois Cent. R. Co., 11 I. C. C. Rep. 486, (**410**).
See also Charlotte Sh. Asso. v. Southern R. Co., 11 I. C. C. Rep. 108, (**386**).

(81) Augusta So. R. Co. v. Wrightsville & T. R. Co., 74 Fed. **522**, 527, (**205**).
Minn. & St. L. R. Co. v. Minnesota, 186 U. S. 257, 262; 46 L. Ed. 1151; 22 Sup. Ct. 900, (1902).
Cf., however, I. C. C. v. Alabama Mid. R. Co., 69 Fed. 227, **232**, (**170-B**).

(82) See Holdzkom v. Michigan Cent. R. Co., et al., 9 I. C. C. Rep. 42, (**292**).
Red Cloud Mining Co. v. Southern Pac. R. Co., 9 I. C. C. Rep. 216, 220, (**304**).
See also infra, §207.

(83) Loup Creek Co. v. Virginia R. Co., 12 I. C. C. Rep. 471, (**541**).

to non-competitive points were unreasonable as compared to lesser rates to nearer competitive points.[84] Such cases as these were decided by the Commission under a misapprehension of the proper construction of Sections 3 and 4 of the Act, and must be read with this fact in mind.

99. Same Subject—Through Rates Exceeding Combined Locals prima facie Unreasonable.

This condition is considered anomalous and requires an explanation by the carriers.[85] In the absence of such an explanation the Commission has ordered the carriers to put in force a through rate not exceeding the sum of the locals.[86] The Commission has refused, however, to make a general order to this effect,[87] and has

(84) See Rice v. Cincinnati W. & B. R. Co., 5 I. C. C. Rep. 193, 228, (147).
Raworth v. Northern Pac. R. Co., 5 I. C. C. Rep. 234, 249, (148).
Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 513, (201-A).

(85) Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 10, (46).
Minnesota Bus. Men's Asso. v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 73, 87, (50).
Re Tariffs of Trans. Con. Lines, 2 I. C. C. Rep. 324, 331, 333, (1888).
Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 37, (291).
Tifton v. Louisville & N. R. Co., 9 I. C. C. Rep. 160, 181, (301).
Cannon Falls F. E. Co. v. Chicago G. W. R. Co., 10 I. C. C. Rep. 650, 659, (374).
Moran v. Missouri Pac. R. Co., 11 I. C. C. Rep. 598, 604, (425).
Laning-Harris Co. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 154, 158, 159, (590).
Coomes v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 192, 194, (597).
Oshkosh Co. v. Chicago & N. W. R. Co., 14 I. C. C. Rep. 109, (672).
Flint Co. v. Lake S. & M. S. R. Co., 14 I. C. C. Rep. 336, (700).
Minneapolis Co. v. Chicago, M. & St. P. R. Co., 14 I. C. C. Rep. 536, (1908).
Wilson v. Chicago, M. & St. P. R. Co., 14 I. C. C. Rep. 549, (1908).
Sylvester v. Penna. R. Co., 14 I. C. C. Rep. 573, (1908).
Hardenberg v. Northern Pac. R. Co., 14 I. C. C. Rep. 579, (1908).
Tar. Circ. 15-A, Ruling No. 56, p. 64.

(86) Hope Cotton Oil Co. v. Texas & Pac. R. Co., 12 I. C. C. Rep. 265, (509).

(87) Coffeyville B. Co. v. St. Louis & S. F. R. Co., 12 I. C. C. Rep. 498, (550).

held that such rates were proper under some circumstances, as when the through rates included a transfer between terminals,[88] or where the local rates were prescribed by State authorities and were considered by the Commission to be unreasonably low.[89] It has also issued a tariff regulation permitting the carriers to reduce such through rates to the sum of the locals, on one day's notice.[90]

100. Same Subject—Significance of Division of Through Rates Among Connecting Carriers.

(As to the power of the Commission to apportion through rates see infra, §279).

In cases involving the propriety of through rates, what the shipper, the public, and hence what the Commission is interested in, is the reasonableness of the total charge. Since the apportionment or division of this total charge does not determine what the charge to the public should be, the Commission has frequently said that it has nothing to do with the division of the through rate.[91]

(88) Behrend v. Washington So. R. Co., 9 I. C. C. Rep. 637, (**329**).

(89) Missouri Bd. of R. Comrs. v. Eureka Spgs. R. Co., 7 I. C. C. Rep. 69, (**218**).

Savannah Bur. of F. & T. v. Charleston & S. R. Co., 7 I. C. C. Rep. 601, (**250**).

Artz v. Seaboard Air Line R. Co., 11 I. C. C. Rep. 458, (**405**).

Brabham v. Atlantic C. L., et al., 11 I. C. C. Rep. 464, (**407**).

See also Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 31, (**291**).

Hope Cot. Oil Co. v. Texas & Pac. R. Co., 10 I. C. C. Rep. 696, (**380**).

Re Freight Rates, 11 I. C. C. Rep. 180, 209, (**393**).

Arkansas R. Com. v. St. Louis & N. Ark. R. Co., 12 I. C. C. Rep. 233, (**503**).

Morgan v. Missouri K. & T. R. Co., 12 I. C. C. Rep. 525, 528, (**554**).

But see Montgomery Fr. Bur. v. Western Ry. of Ala., 14 I. C. C. Rep. 150, (**677**).

(90) Tar Circ. 15-A, Rulings 56 and 81.

(91) Boston Ch. of Com. v. Lake S. & M. S. R. Co., 1 I. C. C. Rep. 436, 453, (**38**).

Toledo Pr. Ex. v. Lake S. & M. S. R. Co., 5 I. C. C. Rep. 166, 188, (**146**).

Georgia Peach Growers' Asso. v. Atlantic C. L. R. Co., 10 I. C. C. Rep. 255, 278, (but see p. 277), (**348**).

And see New Albany Co. v. Mobile J. & K. C. R. Co., 13 I. C. C. Rep. 594, 599, (**648**).

However, as said by the Commission in Florida R. Com. *v.* Savannah F. & W. R. Co., [92] "While the complainant has no interest in the division the defendants make between themselves, and that division does not determine what the charge to the public should be, yet it is not without significance in determining what are reasonable rates for the whole distance on the lines in question." [93]

Thus when the total through rate in question is confessedly made up by combining two or more rates, the Commission is often able to locate the unreasonableness of the whole in an unreasonable demand on the part of one of the participating roads, although each would be responsible for the reasonableness of the aggregate charge. In some cases the Commission has made a separate order against each road, directing each to reduce its share by a given amount.[94]

(92) 5 I. C. C. Rep. 13, 39, (**137**).

(93) Brady v. Penna. R. Co., 2 I. C. C. Rep. 131, 140, (**53**).

Boston Fr. & Pr. Ex. v. New York & N. E. R. Co., 5 I. C. C. Rep. 1, 3, (**128**-B).

Perry v. Florida C. & P. R. Co., 5 I. C. C. Rep. 97, (**142**).

James v. Canadian Pac. R. Co., 5 I. C. C. Rep. 612, 629-630, (**165**).

Troy Bd. of Tr. v. Alabama Mid. R. Co., 6 I. C. C. Rep. 1, 22, (**170**-A)

Cattle Raisers' Asso. v. Fort W. & D. C. R. Co., 7 I. C. C. Rep. 513, 538, (**245**-A).

Savannah Frt. Bur. v. Louisville & N. R. Co., 8 I. C. C. Rep. 377, (**275**-A).

Warren Ehret Co. v. Central R. of N. J., 8 I. C. C. Rep. 598, 604, (**287**).

Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 38, (**291**).

National Lumber Asso. v. Norfolk & W. R. Co., 9 I. C. C. Rep. 87, 115-116, (**297**).

Tift v. Southern R. Co., 10 I. C. C. Rep, 543, 588, (**370**).

Central Yel. Pine Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep, 505, 543, (**369**-A).

Cattle Raisers' Asso. v. Missouri, K. & T. R. Co., 11 I. C. C. Rep. 296, 338, (**399**-A).

Merchants' Tr. As. v. New York, N. H. & H. R. Co., 13 I. C. C. Rep. 225, 228, (**600**).

(94) Cattle Raisers' Asso. v. Fort W. & D. C. R. Co., 7 I. C. C. Rep. 513, 539, (**245**-A).

Savannah Frt. Bur. v. Louisville & N. R. Co., 8 I. C. C. Rep. 377, (**275**-A).

Warren Ehret Co. v. Central R. of N. J., 8 I. C. C. Rep. 598, 607, (**287**).

An initial road running to a competitive point may properly secure for itself a large share of through rates to points beyond its line, by reason of the competition of connecting carriers to secure the traffic brought by it to the competitive junction point.[95]

101. Concert of Action by Naturally Competitive Lines in Fixing the Rates Under Investigation.

Although what the Commission and the Courts are primarily concerned with is the reasonableness, absolute and relative, of the rates under existing conditions, and not the history of their formation,[96] they are much less likely to interfere with a rate fixed under competition, than with one established or advanced by the concerted action of the carriers. The latter circumstance is regarded as "highly significant" in passing on the propriety of a given rate or rate relation.[97] Indeed the fact that a given rate was the result of an agreement between naturally competing lines has been said by the Commission to "rob the rate of the presumption of reasonableness which might otherwise attach to it."[98] It has also said that where a rate has been established under "normal competition," the stifling of such competition by mutual

Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 38, (**291**).

Pitts & Son v. St. Louis & S. F. R. Co., 10 I. C. C. Rep. 684, 687, (**378**).

Pitts & Son v. Atchison, T. & S. F. R. Co., 10 I. C. C. Rep. 691, 695, (**379**).

American G. T. Co. v. Chicago, St. P. M. & O. R. Co., 12 I. C. C. Rep. 141, (**483**).

Baer Bros. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 329, 340, (**617**).

And cf. Burnham Co. v. Chicago, R. I. & P. R. Co., 14 I. C. C. Rep. 299, 313, (**697**).

Florida Asso. v. Atlantic C. L. R. Co., 14 I. C. C. Rep. 476, (**710**).

(95) Re Transportation of Salt, 10 I. C. C. Rep. 148, 169, (**342**).

Cf. Star Co. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 364, 370, (**703**).

(96) See supra, §84.

Also New Orleans Cot. Exch. v. Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. Rep. 375, 384, (**66**).

(97) Tift v. Southern Ry. Co., 138 Fed. 753, 760, (**319-B**).

(98) China & Jap. Tr. Co. v. Georgia R. Co., 12 I. C. C. Rep. 236, 241, (**504**).

understanding of the carriers does not justify an advance of the rate, it not appearing that the former rate was unreasonably low.[99]

Although the Commission has no power to administer the provisions of the Sherman Anti-Trust Act, yet "it is clearly within the scope of the Commission's duty or authority to consider the joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, the result of that action." [100] Where, however, after giving due consideration to this and to other circumstances, the Commission is of the opinion that the rate in question is not unreasonable, the mere fact that it is the result of an unlawful combination will not justify that body in setting it aside.[101]

102. Expert Opinions.

(See also Chap. XXV, §303).

Although, in passing on the propriety of rates, the Courts regard the opinions of expert railroad men as helpful,[102] it must be

(99) Re Proposed Advance in Frt. Rates, 9 I. C. C. Rep. 382, 395, (313).

See also Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 141, (111).

(100) Cincinnati Frt. Bur. v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 246, (183-A).

Sprigg v. Baltimore & O. R. Co., 8 I. C. C. Rep. 443, 456-7, (279).

Central Yellow Pine Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 540, (369-A).

Tift v. Southern Ry. Co., 10 I. C. C. Rep. 548, 579, (370), 138 Fed. 753, 760, (319-B).

Re Rates from St. Louis to Texas, 11 I. C. C. Rep. 238, 269, (397).

Cattle Raisers' Asso. v. Missouri, K & T. R. Co., 11 I. C. C. Rep. 296, 343, (399-A).

City Gas Co. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 371, 381, (401).

China & Jap. Tr. Co. v. Georgia R. Co., 12 I. C. C. Rep. 236, 241, (504).

Quimby v. Clyde S. S. Co., 12 I. C. C. Rep. 392, (525).

Enterprise Mfg. Co. v. Georgia R. Co., 12 I. C. C. Rep. 451, 455-456, (536).

Kentucky R. Com. v. Louisville & N. R. Co., 13 I. C. C. Rep. 300, 309, (614).

(101) China & Jap. Tr. Co. v. Georgia R. Co., 12 I. C. C. Rep. 236, 241, (504).

See also Warren Mfg. Co. v. Southern R. Co., 12 I. C. C. Rep. 381, 387, (523).

(102) I. C. C. v. Southern R. Co., 117 Fed. 741, 744, (277-C).

remembered that practically all the railroad experts are employes of the carriers, and to an extent biased in their favor. The Courts are continually called upon to review the work of experts in all branches of business and science, and indeed the Commission is itself an expert tribunal.[103]

The Commission gives but little weight to the opinion of a traffic manager with regard to a given rate, unless he gives what appear to be sound reasons for his opinion.[104]

103. Opinions of State Railroad Commissions.

Although the Commission gives due consideration to rates fixed by State Legislatures or Commissions, and although it has frequently been said that such bodies are entitled to the highest respect, nevertheless, in passing on the reasonableness of an interstate rate for a through haul, part of which is between points where rates have been prescribed by the State authorities governing intra-state shipments, the Federal Commission and the Courts will exercise their own independent judgment.[105] They will not necessarily require that the part of the interstate rate applicable to the haul which, as to intra-state shipments, is regulated by the State authorities, shall correspond to the rate prescribed for intra-state traffic.[106] The mere fact that a State Railroad Commission has ordered the reduction of a given rate, as applied to intra-state shipments, is not sufficient in itself to move the Com-

(103) See Taft, C. J., in East Tenn., V. & G. R. Co. v. I. C. C., 99 Fed. 52, 64, (**162**-C).

Tift v. Southern R. Co., 138 Fed. 753, 760, (**319**-B).

(104) Cattle Raisers' Asso. v. Missouri, K. & T. R. Co., 11 I. C. C. Rep. 296, 346, (**399**-A).

See also Delaware St. Grange v. New York, P. & N. R. Co., 5 I. C. C. Rep. 161, 162, (**125**).

See also infra, §303.

(105) Corn Belt Asso. v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 376, 383-385, (**704**).

(106) Cutting v. Florida R. & N. Co., 46 Fed. 641, (1891).

Augusta So. R. Co. v. W. & T. R. Co., 74 Fed. 522, (**205**).

See also Hope Cot. Oil Co. v. Texas & Pac. R. Co., 12 I. C. C. Rep. 265, 269, (**509**), (21st Ann. Rep. 74), where the Commission said that a rate prescribed by a State statute or Commission had no greater sanctity, as applied to interstate traffic, than one established by a railroad company.

mission to take the same action in regard to interstate rates.[107] The rights of shippers under State laws are subject, as regards interstate traffic, to the provisions of the Interstate Commerce Act.[108]

Accordingly, in spite of the general rule that a through rate should never exceed the sum of the local rates between intermediate points, the Commission has approved rates on traffic between two States which exceeded the sum of the local intra-state rates prescribed by the States and extending to the State boundaries.[109]

Where it appeared that a State Railroad Commission, by means of its power to regulate intra-state rates, had control of a rate situation in which interstate rates were involved, the Commission left the whole matter to the regulation of the State authorities, where interference by the Federal Commission did not seem clearly necessary to correct manifestly unreasonable interstate rates.[110]

(107) Marshall Oil Co. v. Chicago & N. W. R. Co., 14 I. C. C. Rep. 210, (686).

(108) U. S. ex rel. Logan Coal Co. v. Pennsylvania R. Co., 154 Fed. 497, 503, (511).

See also supra, §28.

(109) Pyle v. East Tenn., V. & G. R. Co., 1 I. C. C. Rep. 465, 478, (39).

Missouri Board of R. Com'rs. v. Eureka Springs R. Co., 7 I. C. C. Rep. 69, 77, (218).

Savannah Bureau of Frt. & Trans. v. Charleston & Sav. R. Co., 7 I. C. C. Rep. 601, (250).

Artz v. Seaboard Air Line Ry., 11 I. C. C. Rep. 458, (405).

Brabham, et al. v. Atlantic Coast L. R. Co., et al., 11 I. C. C. Rep. 464, (407).

Arkansas R. Com. v. St. Louis & N. A. R. Co., 12 I. C. C. Rep. 233, (503).

See also Dawson Bd. of Tr. v. Central of Ga. R. Co., 8 I. C. C. Rep. 142, 155, (262).

Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 33, (291).

Re Freight Rates, 11 I. C. C. Rep. 180, 209, (393).

Rock Hill Buggy Co. v. Southern R. Co., 11 I. C. C. Rep. 229, (395).

Paper Mills Co. v. Penna. R. Co., 12 I. C. C. Rep. 438, (534).

(110) Dallas Freight Bur. v. Texas & Pac. R. Co., 8 I. C. C. Rep. 33, 46, (256).

Hastings Malting Co. v. Chicago, M. & St. P. R. Co., 11 I. C. C. Rep. 675, 682, (438).

See, however, Interstate Stock Yards Co. v. Indianapolis Un. R. Co., 99 Fed. 472, 478-9, (276).

104. Expression of Satisfaction by Shippers with Rates Complained of.

In certain cases before the Commission, the carriers have laid weight on the fact that shippers have prospered under the rates complained of, or have expressed themselves as satisfied with these rates. Although, of course, this must necessarily be a circumstance tending to show that the rate is reasonable, yet rates are not properly regarded solely as a tax on commerce, varying with the prosperity of the industry.[111] In some cases the Commission regards as proper and reasonable, rates which are lower than those which the shippers can afford to pay.[112]

(111) See Supra, §51.

(112) James & Abbott v. Canadian Pac. R. Co., 5 I. C. C. Rep. 612, 632-633, (**165**).

Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 478-479, (**200**).

Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 548, 557, (**180-C**).

Central Yel. Pine Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 535-6, (**369-A**).

Tift v. Southern R. Co., 10 I. C. C. Rep. 548, 582, (**370**).

Tift v. Southern R. Co., 138 Fed. 753, 763, (**319-B**); 206 U. S. 428, 441; 51 L. Ed. 1124; 27 Sup. Ct. 709, (**319-C**).

The Commission has passed upon the Rates or Classification of the following Commodities:

Agate Ware—Chattanooga Chamber of Commerce v. Southern Ry. Co., 10 I. C. C. Rep. 111, (**341**).

Agricultural Implements—Phoenix Shippers' Union v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 250, (**306**).

Alcohol—Oregon Railroad Co. v. Chicago & Alton R. Co. et al., 12 I. C. C. Rep. 541, (**558**).

Angle Beads—Duluth Shingle Co. v. Duluth S. S. & A. R. Co. et al., 10 I. C. C. Rep. 489, (**368**).

Apples—Truck Farmers' Asso. of Charleston v. Northeastern R. Co. of S. C. et al., 6 I. C. C. Rep. 295, (**191-A**).

National Hay Asso. v. Lake Shore & M. S. Ry. Co., 9 I. C. C. Rep. 264, (**309-A**).

Desel- Boettcher & Co. v. Kansas City S. Ry. Co. et al., 12 I. C. C. Rep. 221, (**500**).

Gamble Robinson Co. v. Northern Pac. Ry. Co., 14 I. C. C. Rep. 523, (1908).

Asbestos—Chicago Fire Proof Covering Co. v. Chicago & N. W. R. Co. et al., 8 I. C. C. Rep. 316, (**269**).

Astragals—Duluth Shingle Co. v. Duluth S. S. & A. R. Co. et al., 10 I. C. C. Rep. 489, (**368**).

Bacon—Savannah Bur. of Fr. et al. v. Louisville & N. R. Co. et al., 8 I. C. C. Rep., 377, (**275-A**).

Bags—(Paper) Wolf & Bros. v. Allegheny Val. Ry. Co. et al., 7 I. C. C. Rep. 40, (**215**).

Baking Powder—Kindel, et al. v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 606, (**327**).

Transportation of Salt, et al., 10 I. C. C. Rep. 148, (**342**).

Chattanooga Chamber of Commerce v. Southern Ry. Co. et al., 10 I. C. C. Rep. 111, (**341**).

Balusters—Duluth Shingle Co. v. Duluth S. S. & A. R. Co. et al., 10 I. C. C. Rep. 489, (**368**).

Bananas—Gardner & Clark v. Southern Ry. Co., 10 I. C. C. Rep. 342, (**355**).

Topeka Banana Dealers' Asso. v. St. Louis & S. F. R. Co. et al. 13 I. C. C. Rep. 620, (**653**).

Barley—Buchanan v. Northern Pac. R. Co., 5 I. C. C. Rep. 7, (**136**).

Schumacher Milling Co. et al. v. Chicago, R. I. & P. R. Co. et al., 6 I. C. C. Rep. 61, (**172**).

Cannon Falls F. E. & Co. v. Chicago G. W. R. Co. et al., 10 I. C. C. Rep. 650, (**374**).

Barrel Material—Holmes & Co. v. Southern Ry. et al., 8 I. C. C. Rep. 561, 570, (**284**).

Beans—Truck Farmers' Asso. of Charleston v. Northeastern R. Co. of S. C. et al., 6 I. C. C. Rep. 295, (**191-A**).

Rea v. Mobile & O. R. Co., 7 I. C. C. Rep. 43, (**216**).

Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 250, (**306**).

Chattanooga Chamber of Commerce v. Southern Ry. Co., 10 I. C. C. Rep. 111, (**341**).

Beef Cattle—New Orleans Live Stock Exch. v. Texas & Pac. Ry. Co., 10 I. C. C. Rep. 327, (**352**).

Beer—Cutter v. Atchison, T. & S. F. R. Co. et al., 11 I. C. C. Rep. 689, (**440**).

Baer Bros. Co. v. Missouri Pac. R. Co. et al., 13 I. C. C. Rep. 329, (**617**).

Bicycles—Merchants' Traffic Asso. v. Atchison, T. & S. F. Ry. Co. et al., 13 I. C. C. Rep. 283, (**609**).

Bitters—Myers v. Pennsylvania Co. et al., 2 I. C. C. Rep. 573, (**72**).

Blacking Brushes—Derr Mfg. Co. v. Pennsylvania R. Co. et al., 9 I. C. C. Rep. 646, (**331**).

Blankets—Kindel, et al. v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 606, (**327**).

Blinds—Duluth Shingle Co. v. Duluth S. S. & A. Ry. Co. et al., 10 I. C. C. Rep. 489, (**368**).

Boards—Central Yellow Pine Asso. v. Illinois C. Ry. Co. et al., 10 I. C. C. Rep. 505, (**369-A**).

Bookcases—(*Sectional*) Globe-Wernicke Co. v. Baltimore & O. S. W. Ry. Co. et al., 11 I. C. C. Rep. 156, (**390**).

Books—Pankey v. Richmond & Danville Ry. Co. et al., 3 I. C. C. Rep. 658, (**102**).

Kindel et al. v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 606, (**327**).

Boots and Shoes—Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 250, (**306**).

Bottles—(*Of Milk*) Milk Producers' Protective Asso. v. Delaware, L. & W. Ry. Co. et al., 7 I. C. C. Rep. 92, (**220**).

Box Shooks—Michigan Box Co. v. Flint & P. M. Ry. Co. et al., 6 I. C. C. Rep. 335, (**196**).

Bran—National Hay Asso. v. Lake Shore & M. S. Ry. Co. et al., 9 I. C. C. Rep. 264, (**309-A**).

Marshall Michel Grain Co. v. Missouri Pac. Ry. Co., 13 I. C. C. Rep. 566, (**643**).

Brandy—Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 250, (**306**).

Brick Machinery—Durham v. Illinois Cent. Ry. Co., 12 I. C. C. Rep. 37, (**460**).

Bricks—Stowe-Fuller Co. v. Pennsylvania Co. et al., 12 I. C. C. Rep. 216, (**499**).

Coffeyville Brick Co. v. St. Louis & San. Fran. Ry. Co., and Chicago, R. I. & Pac. Ry. Co., 12 I. C. C. Rep. 489, (**550**).

Bricks—(*Enameled*) Hydraulic Press Brick Co. v. St. Louis & S. F. Ry. Co. et al., 13 I. C. C. Rep. 342, (**618**).

Broom Corn—Coomes et al. v. Chicago, M. & St. P. Ry. Co. et al., 13 I. C. C. Rep. 192, (**597**).

Broom and Wire Brushes—Forest City Fr. Bur. v. Ann Arbor Ry. Co. et al., 13 I. C. C. Rep. 109, (**582**).

Brushes—Derr Mfg. Co. v. Pennsylvania Ry. Co. et al., 9 I. C. C. Rep. 646, (**331**).

Buckwheat Grits—Schumacher Milling Co. et al. v. Chicago, R. I. & P. Ry. Co., 6 I. C. C. Rep. 61, (**172**).

Buggies—Holdzkom v. Michigan Cent. R. Co. et al., 9 I. C. C. Rep. 42, (**292**).

Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9. I. C. C. Rep. 250, (**306**).

Rock Hill Buggy Co. v. Southern Ry. Co. et al., 11 I. C. C. Rep. 229, (**395**).

Burial Vaults—(*Cement*) Van Camp Burial Vault Co. v. Chicago, Ind. & Louis. Ry. Co. et al., 12 I. C. C. Rep. 80, (**472**).

Burlap Bags—(*Empty*) Rau v. Pennsylvania R. Ry. Co. et al., 12 I. C. C. Rep. 199, (**496**).

Butter—Lincoln Creamery v. Union Pac. Ry. Co., 5 I. C. C. Rep. 156, (**145**).

Morse Produce Co. v. Chicago, M. & St. P. Ry. Co. et al., 12 I. C. C. Rep. 485, (**546**).

Cabbage—Truck Farmers' Asso. of Charleston v. Northeastern Ry. Co. of S. C. et al., 6 I. C. C. Rep, 295, (**191-A**).

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Slates—Chattanooga Chamber of Commerce v. Southern Ry. Co., 10 I. C. C. Rep. 111, (341).

Small Vein Coal—Georgia's Creek Basin Coal Co. v. Baltimore & Ohio Ry. Co. et al., 14 I. C. C. Rep. 127, (675).

Snapped Corn—Pitts & Son v. St. Louis & S. F. Ry. Co., 10 I. C. C. Rep. 684, (378).

Ocheltree Grain Co. v. St. Louis & S. F. Ry. Co., 13 I. C. C. Rep. 46, (574).

Soap—Andrews Soap Co. v. Pittsburg, C. & St. L. Ry. Co. et al., 4 I. C. C. Rep. 41, (105).

Pyle & Sons v. East Tenn. Va. & Ga. Ry. Co., 1 I. C. C. Rep. 465, (39).

Beaver & Co. v. Pittsburg, C. C. & St. L. Ry. Co., 4 I. C. C. Rep. 733, (131).

Proctor & Gamble v. Cincinnati & H. D. et al., 4 I. C. C. Rep. 87, (109).

Proctor & Gamble v. Cincinnati, H. & D. et al., 9 I. C. C. Rep. 440, (314-A).

Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 250, (306).

Soil Pipe—St. Louis Business Men's League v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 318, (311).

Spindles—Duluth Shingle Co. v. Duluth S. S. & A. Ry. Co. et al., 10 I. C. C. Rep. 489, (368).

Spring Bed Material—Murphy, Wasey & Co. v. Wabash R. Co., 5 I. C. C. Rep. 122, (143).

Squash—Truck Farmers' Asso. of Charleston v. Northeastern Ry. of S. C., 6 I. C. C. Rep. 295, (191-A).

Stair Work—Duluth Shingle Co. v. Duluth S. S. & A. Ry. Co. et al., 10 I. C. C. Rep. 489, (368).

Steel—Colorado F. & I. Co. et al. v. Southern Pac. Co. et al., 6 I. C. C. Rep. 488, (201-A).

Steel Rails—Cambria Steel Co. v. Great Northern Ry. Co., 12 I. C. C. Rep. 466, (540).

Stock Cattle—Shimmer v. Chicago, St. P., M. & O. Ry. Co. et al., 14 I. C. C. Rep. 525, (1908).

Stone—Romona Stone Co. v. Vandalia Ry. Co., 13 I. C. C. Rep. 115, (583).

Stove Fronts—Duluth Shingle Co. v. Duluth S. S. & A. Ry. Co. et al., 10 I. C. C. Rep. 489, (368).

Straw—National Hay Asso. v. Lake Shore & M. S. Ry. Co., 9 I. C. C. Rep. 264, (309-A).

Strawberries—Perry v. Florida C. & P. Ry. Co. et al., 5 I. C. C. Rep. 97, (142).

Truck Farmers' Asso. of Charleston v. Northeastern Ry. of S. C. et al., 6 I. C. C. Rep. 295, (191-A).

American Fruit Union v. Cincinnati, N. O. & T. P. Ry. Co., 12 I. C. C. Rep. 411, (527).

Florida Fruit, etc. Asso. v. Atlantic Coast Line Ry. Co., 14 I. C. C. Rep. 476, (710).

Structural Iron—Ottumwa Bridge Co. v. Chicago, M. & St. P. Ry. Co., 14 I. C. C. Rep. 121, (674).

Sub-Structures—Flint & Walling Mfg. Co. v. Grand Rapids & I. Ry. Co. et al., 14 I. C. C. Rep. 520, (717).

Sugar—Lehmann, Higginson & Co. v. Southern Pac. Ry. Co. et al., 4 I. C. C. Rep. 1, (103).

Lehmann Higginson & Co. v. Texas & Pac. Ry. Co. et al., 5 I. C. C. Rep. 44, (139).

Raworth v. Northern Pac. Ry. Co. et al., 5 I. C. C. Rep. 234, (148).

Johnston-Larimer Co. et al. v. Atchison, T. & S. F. Ry. Co., 6 I. C. C. Rep. 568, (207).

Calloway v. Louisville & N. Ry. Co., 7 I. C. C. Rep. 431, (242-A).

Phillips, Bailey & Co. et al. v. Louisville & N. Ry. Co. et al., 8 I. C. C. Rep. 93, (259).

Savannah Bur. of Fr. & T. v. Louisville & N. Ry. Co., 8 I. C. C. Rep. 377, (275-A).

Danville v. Southern Ry. et al., 8 I. C. C. Rep. 409, (277-A).

Gustin v. Burlington & M. Ry. Co. et al., 8 I. C. C. Rep. 481, (280).

Kindel et al. v. Atchison, T. & S. F. Ry. Co., 8 I. C. C. Rep. 608, (288).

Mayor & Council of Tifton v. Louisville & N. Ry. Co., 9 I. C. C. Rep. 160, (301).

Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 250, (306).

Blackman v. Southern Ry. Co. et al., 10 I. C. C. Rep. 352, (356).

Lehmann, Higginson & Co. v. Atchison, T. & S. F. Ry. Co. et al., 10 I. C. C. Rep. 460, (366).

Payne-Gardner & Co. v. Louisville & N. Ry. Co., 13 I. C. C. Rep. 638, (655).

Surgical Chairs—Harvard Co. v. Pennsylvania Co. et al., 4 I. C. C. Rep. 212, (114).

Tanks—Flint & Walling Mfg. Co. v. Grand Rapids & I. R. Co. et al., 14 I. C. C. Rep. 520, (717).

Threshing Machines—Minneapolis Threshing Machine Co. v. Chicago, R. I. & Pac. Ry. Co., 13 I. C. C. Rep. 128, (586).

Tobacco—Danville v. Southern Ry. et al., 8 I. C. C. Rep. 409, (277-A).

Toilet and Laundry Soap—Beaver & Co. v. Pittsburg, C. & St. L. Ry. Co. et al.,4 I. C. C. Rep. 733, (131).

Tomatoes—Rea v. Mobile & O. Ry. Co., 7 I. C. C. Rep. 43, (216).

Turnips—Truck Farmers' Asso. of Charleston v. Northeastern Ry. of S. C., 6 I. C. C. Rep. 295, (191-A).

Turpentine—Savannah Bur. of Fr. and T. v. Louisville & N. Ry. Co., 8 I. C. C. Rep. 377, (**275-A**).

Vanilla Beans—Kindel et al. v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 606, (**327**).

Vegetables—Delaware S. Grange v. New York, P. & N. Ry. Co., 4 I. C. C. Rep. 588, (**125**).

Rea v. Mobile & O. Ry. Co., 7 I. C. C. Rep. 43, (**216**).

Re Alleged Unlawful Charges for Vegetables, etc., 8 I. C. C. Rep. 585, (**286**).

Truck Farmers' Asso. of Charleston v. Northeastern Ry. of S. C., 6 I. C. C. Rep. 295, (**191-A**).

Florida Fruit, etc. Asso. v. Atlantic Coast Line Ry. Co., 14 I. C. C. Rep. 476, (**710**).

Wagons—Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 250, (**306**).

Wainscoting—Duluth Shingle Co. v. Duluth S. S. & A. E. Ry. Co. et al., 10 I. C. C. Rep. 489, (**368**).

Walnut Lumber—Miller Walnut Co. v. Atchison, T. & S. F. R. Ry. Co. et al., 13 I. C. C. Rep. 43, (**573**).

Water Tanks—Flint & Walling Mfg. Co. v. Lake Shore & M. S. Ry. Co. et al., 14 I. C. C. Rep. 336, (**700**).

Whale Bone and Whale Oil Foots—Kindel et al. v. Atchison, T. & S. F. Ry. Co. et al., 9 I. C. C. Rep. 606, (**327**).

Wheat—Evans v. Oregon Ry. & Nav. Co., 1 I. C. C. Rep. 325, (**32**).

Milwaukee Chamber of Commerce v. Fline & P. M. Ry. Co., 2 I. C. C. Rep. 553, (**71**).

Re Food Products Excessive Rates, 4 I. C. C. Rep. 48, (**106**).

Buchanan v. Northern Pac. Ry. Co., 5 I. C. C. Rep. 7, (**136**).

Minneapolis Chamber of Commerce v. Great Northen Ry. Co. et al., 5 I. C. C. Rep. 571, (**163**).

Schumacher Milling Co. v. Chicago, R. I. & P. Ry. Co., 6 I. C. C. Rep. 61, (**172**).

Morrell v. Union Pac. Ry. Co. et al., 6 I. C. C. Rep. 121, (**176**).

Newland et al. v. Northern Pac. Ry. Co. et al., 6 I. C. C. Rep. 131, (**179**).

Milwaukee Chamber of Com. v. Chicago, M. & St. P. Ry. Co. et al., 7 I. C. C. Rep. 481, (**244**).

Kentucky Board of R. R. Comm'rs. v. Cincinnati, N. O. & T. P. Ry. Co. et al., 7 I. C. C. Rep. 380, (**239**).

Grain Shippers' Asso. of Iowa v. Illinois Cent. Ry. Co. et al., 8 I. C. C. Rep., 158, (**263**).

Re Export and Domestic Rates on Grain and Products thereof, 8 I. C. C. Rep. 214, (**265**).

Kansas Board of R. Comm'rs. v. Atchison, T. & S. F. Ry. Co. et al., 8 I. C. C. Rep. 304, (**268**).

National Hay Asso. v. Lake Shore & M. S. Ry. Co., 9 I. C. C. Rep. 204, (**309-A**).

Mayor, etc. of Wichita v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 558, (**323**).

Mayor, etc. of Wichita v. Missouri Pac. Ry. Co. et al., 10 I. C. C. Rep. 35, (**336**).

Aberdeen Group Commercial v. Mobile & O. Ry. Co., 10 I. C. C. Rep. 289, (**350**).

Cannon Falls F. E. & Co. v. Chicago G. W. Ry. Co. et al., 10 I. C. C. Rep. 650, (**374**).

Mitchell v. Atchison, T. & S. F. Ry. Co. et al., 12 I. C. C. Rep. 324, (**516**).

Oklahoma Territory v. Chicago, R. I. & Pac. Ry. Co. et al., 12 I. C. C. Rep. 367, (**520**).

White Oak Staves—Omaha Cooperage Co. v. Nashville, Chat. & St. L. Ry. Co. et al., 12 I. C. C. Rep. 250, (**507**).

Window Frames and Screens—Duluth Shingle Co. v. Duluth S. S. & A. Ry. Co. et al., 10 I. C. C. Rep. 489, (**368**).

Window Shades—Page et al. v. Delaware, L. & W. Ry. Co. et al., 6 I. C. C. Rep. 148, (**180-A**).

Page et al. v. Delaware, L. & W. Ry. Co. et al., 6 I. C. C. Rep. 548, (**180-C**).

Wire Fence, Woodenware—Phoenix Shippers' Union v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 250, (**306**).

Wire Brushes and Brooms—Forest City Fr. Bur. v. Ann Arbor Ry. Co. et al., 13 I. C. C. Rep. 109, (**582**).

Wire Screens—Phillips Co. v. Grand T. & W. Ry. Co. et al., 11 I. C. C. Rep. 659, (**436**).

Wooden Pails—Menasha Wooden Ware Co. v. Atchison, T. & S. F. Ry. Co. et al., 11 I. C. C. Rep. 666, (**437**).

Wood Pulp—Rhinelander Paper Co. v. Northern Pac. Ry. Co. et al., 13 I. C. C. Rep. 633, (**654**).

Wool—Kindel et al v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 606, (**327**).

Weil Bro. v. Pennsylvania Ry. Co. et al., 11 I. C. C. Rep. 627, (**432**).

Zinc Sheets, Zinc Slab—St. Louis Business Men's Asso. v. Atchison, T. & S. F. Ry. Co., 9 I. C. C. Rep. 318, (**311**).

CHAPTER IX.

JUST AND REASONABLE CHARGES—REGULATIONS AFFECTING RATES.[1]

105. Classification of Freight.
106. Same Subject — Simplicity and Uniformity the Object of Classification.
107. Same Subject — Mathematical Accuracy Impossible—Substantial Approximation only Required.
108. Same Subject — Classification may not be Based on Use to which Commodity is to be put.
109. Same Subject—Circumstances Determining Classification.
110. Miscellaneous Regulations Affecting Rates — Minimum Carload, Reweighing, Loading and Unloading Regulations.

105. Classification of Freight.

"Classification," said the Commission in its first Annual Report, "is the foundation of all rate making." [2]

For the railroads to attempt to fix a separate rate for each commodity shipped, would not only be unduly burdensome to them and entirely impractical, but it would lead to an endless complication of tariffs, which would undoubtedly be more objectionable to shippers in general than a simpler system of rates adjusted with less theoretical nicety. On all sides it has been found advisable to sacrifice, to a certain etxent, mathematical accuracy, for the sake of securing practical simplicity.

To this end there has been universally adopted a system of fixing rates known as the Classification System. Under this system all the commodities shipped are divided into classes, and a rate fixed for each class. In addition to the class rates, articles in which there is great activity are usually given special "commodity rates" between the principal shipping points.[3]

(1) As to rules regulating car-distribution see infra, Chap. XV.

(2) 1 I. C. C. Rep. 303.

(3) The fixing of a commodity rate takes the commodity named out of the classification and makes the commodity rate the only lawful rate, Admin. Rul. No. 84, (June 9th, 1906).
Tar. Circ. 15-A, Rule 7.

106. Same Subject—Simplicity and Uniformity the Object of Classification.

The aim both of the carriers and of the Commission is to have the various classifications in force as simple and as nearly uniform as practicable. A number of attempts have been made, and conferences held, for the purpose of securing uniform classification throughout the United States, but up to the present time this has not been possible, owing to the different conditions existing in the different parts of the country.[4] A certain amount of confusion must necessarily result, therefore, in case freight passes through two different classification areas, but for the present this would seem to be unavoidable. The tendency is clearly towards simplicity and uniformity of classification.[5]

As in the case of fixing rates in general, both the Commission and the Courts recognize that the Classification Committees of the various railroads are the first judges as to what is the proper classification for freight. In relation to these matters, they are allowed a broad discretion; the Commission and the Courts are not

(4) See 1st Ann. Rep., 1 I. C. C. Rep. 302-307; 2nd id., 2 I. C. C. Rep. 451-462; 3rd id., 3 I. C. C. Rep. 351-364; 4th id., 4 I. C. C. Rep. 364-371; 5th id. 23-34; 11th id. 62-71; 21st id. 19-20, etc.

(5) See 1st Ann. Rep. 1 I. C. C. Rep. 302-306.
Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 8, (46).
Myers v. Penn. Co., 2 I. C. C. Rep. 573, (72).
Re Tariffs & Class. of Atlanta & West P. R. Co., 3 I. C. C. Rep. 19, 26, (1889).
At the present time there are three main Classifications governing interstate traffic,—the Official, the Southern and the Western. The Official Classification holds east of the Mississippi and north of the Ohio and Potomac Rivers; the Southern east of the Mississippi and south of the Ohio and Potomac Rivers; and the Western in the rest of the country, There is also a transcontinental tariff in force as to Pacific Coast traffic, issued by the Transcontinental Freight Bureau and establishing rates on numerous commodities, but this is not really a classification in the sense in which that term is applied to the other three.
In the Official Classification there are six numbered classes and two classes governed by rules; in reality eight classes. In seven of these eight classes, there are less-than-carload ratings. In the Southern Classification there are six numbered and seven lettered classes in all of which there are less-than-carload ratings. In the Western Classification, there are five numbered and five lettered classes, but in only four of these are there less-than-carload ratings. In the Official Classification there is a general rule authorizing mixed carloads, but in the Southern and Western Territory, the provisions in this respect are very restricted.

disposed to alter the classifications made by them, unless substantial justice clearly requires it.[6]

107. Same Subject—Mathematical Accuracy Impossible—Substantial Approximation only Required.

It is also recognized that no classification can be mathematically accurate or absolutely just, and substantial approximation is all that is required.[7] In Derr Mfg. Co. *v.* Penna. R. Co.,[8] Commissioner Clements said:

"While there are exceptional instances requiring deviation from the general practice, it is manifest that to require the separation and grading into different classes with varying rates, the different grades of the same article of freight would greatly complicate the matter and would go far to defeat the very purpose of classification. Even then it would be impracticable to apportion with mathematical exactness the burdens of transportation. The best that is obtainable in this direction is reasonable and substantial approximation."

As a general rule, articles of the same general character should be classed alike, and in order to compel a railroad to place articles of the same nature in different classes, the evidence must be clear that the two are bought and sold as separate commodities.[9]

(6) Harvard Co. v. Penna. Co., 4 I. C. C. Rep. 212, 223, (**114**).
Planters' Compress Co. v. Cleveland C. C. & St. L. R. Co., 11 I. C. C. Rep. 382, 409, (**402**).
See also supra, §85, n.23, and §89.

(7) Wolf Bros. v. Allegheny Val. R. Co., 7 I. C. C. Rep. 40, 42, (**215**).
Planters' Compress Co. v. Cleveland C. C. & St. L. R. Co., 11 I. C. C. Rep. 382, 405, (**402**).
See also 1st Ann. Rep. 1 I. C. C. Rep. 313.
I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 419, 421, (**156-B**).

(8) 9 I. C. C. Rep. 646, 648, (**331**).

(9) Reynolds v. Western N. Y. & P. R. Co., 1 I. C. C. Rep. 393, (**35**).
Pyle v. East Tenn. V. & G. R. Co., 1 I. C. C. Rep. 465, 473, (**39**).
Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 8, (**46**).
Globe-Wernicke Co. v. Balt. & O. S. W. R. Co., 11 I. C. C. Rep. 156, 164, (**390**).
Newman v. New York C. R. Co., 11 I. C. C. Rep. 517, 521, (**414**).
And see Forest City Fr. Bur. v. Ann Arbor R. Co., 13 I. C. C. Rep. 109, 114, 118, (**582**).
Cf. also Cannon v. Mobile & O. R. Co., 11 I. C. C. Rep. 537, 545, (**418**).

108. Same Subject—Classification May not be Based on Use to which Commodity is to be Put.

In Stowe-Fuller Co. *v.* Penna. Co.,[10] Commissioner Lane said: "We cannot regard a classification as scientific, or a difference in rates as well based, which is altogether founded upon a distinction that has no transportation significance."

In this case it was held that a different classification of certain kinds of bricks, depending upon the use to which they were made, was not sound, where from the appearance of the bricks the carrier could not tell them apart.[11]

109. Same Subject—Circumstances Determining Classification.

The considerations entering into the classification of freight or influencing the Courts or Commission in passing on the reasonableness of a given classification, are, of course, the same as in case of rates in general.[12] General statements as to the principal conditions determining the classification of goods are found in the opinions of the Commission cited below.[13] A tabulated list of articles the classification of which has been passed on by the Commission is given in note.[14]

(10) 12 I. C. C. Rep. 215, 219, (499).

(11) See also Fort Sm. Tr. Bur. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 651, (657).

Cf. McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 641, (289).

Capital City Gas Co. v. Central V. R. Co., 11 I. C. C. Rep. 104, (385).

National Machinery Co. v. Pittsburg C. C. & St. L. R. Co., 11 I. C. C. Rep. 581, 584, (422).

Admin, Rul. No. 34.

See also supra, §53.

And see Georges Creek Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 127, (675).

The decision last cited would seem inconsistent with other decisions by the Commission. See supra, §89.

(12) See supra, Chaps. VI, VII, and VIII.

(13) Warner v. New York C. & H. R. R. Co., 4 I. C. C. Rep. 32, (104).

Harvard Co. v. Penn. Co., 4 I. C. C. Rep. 212, 220, (114).

Brownell v. Columbus & C. M. R. Co., 5 I. C. C. Rep. 638, 642, (167).

Page v. D. S. W. R. Co., 6 I. C. C. Rep. 548, 565, (180-C).

Myer v. Cleveland, C. C. & St. L. R. Co., 9 I. C. C. Rep. 78, 83, (296).

Procter & Gamble v. Cincinnati, H. & D. R. Co., 9 I. C. C. Rep. 440, 482, (314-A).

See also Union Pac. T. Co. v. Penna R. Co., 14 I. C. C. Rep. 545, (719).

(14) The Commission has passed on the Classification of the following commodities:

Barrel Stock, Base Boards, Bed Slats and Butternut Lumber—Duluth Shingle Co. v. Duluth S. S. & A. R. Co., et al., 10 I. C. C. Rep. 489, (1905), (**368**).

Beans—Rea v. Mobile & O. R. Co., 7 I. C. C. Rep. 43, (1897), (**216**).

Bitters—Myers v. Penn, Co., 2 I. C. C. Rep. 573, (1839), (**72**).

Bookcases—GlobeWernicke Co. v. Baltimore & O. S. W. R. Co., 11 I. C. C. Rep. 156, (1905), (**390**).

Bricks—Stowe-Fuller Co. v. Penn. Co., 12 I. C. C. Rep. 215, (1907), (**499**).

Burial Vaults—(*Cement*), Van Camp Burial Vault Co. v. Chicago, Ind. & St. Louis Ry. Co., 12 I. C. C. Rep. 80, (1907), (**472**).

Carpenters' Moulding, Casings, Cherry Lumber—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Celery—Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co., 5 I. C. C. Rep. 663, (1893), (**169**).

Cement Burial Vaults—Van Camp Burial Vault Co. v. Chicago, Ind. & Louis. Ry. Co., 12 I. C. C. Rep. 80, (1907), (**472**).

Cereals and Flour—Schumacher Milling Co. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 61, (1893), (**172**).

Cowpeas—Swafield v. Atlantic Coast L. and L. & N. R. Co., 10 I. C. C. Rep. 281, (1904), (**349**).

Dynamos—(Second-Hand), National Machinery & Wrecking Co. v. Pittsburg, C. C. & St. L. R. Co., 11 I. C. C. Rep. 581, (1906), (**422**).

Eggs—Brownell v. Columbus & C. M. R. Co., 5 I. C. C. Rep. 638, (1893), (**167**).

Egg Cases—Rhode Island Egg & Butter Co. v. Lake Shore & M. S. R. Co., 6 I. C. C. Rep. 176, (1894), (**182**).

Electrical Apparatus—Scheidel v. Chicago & N. W. R. Co., and Union Pac. R. Co., 11 I. C. C. Rep. 532, (1906), (**416**).

Envelopes—Wolf Bros. v. Allegheny Val. Ry. Co., 7 I. C. C. Rep. 40, (1897), (**215**).

Fence Posts—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Fertilizer—Swafield v. Atlantic, C. L. Ry., 10 I. C. C. Rep. 281, (1904), (**349**).

Flour—Schumacher Milling v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 61, (1893), (**172**).

Fruits—Martin v. Southern Pac. Co., 2 I. C. C. Rep. 1, (1883), (**46**).

Fruit and Vegetable Packages—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep, 489, (1905), (**368**).

Grain and Grain Products—McMorran v. Grand T. Ry. of C., 3 I. C. C. Rep. 252, (1889), (**86**).

Groceries—Thurber v. New York Cent. & H. R. R. Co., 3 I. C. C. Rep. 473, (1890), (**92**).

Hatters Furs—Myer v. Cleveland, C. C. & St. L. R. Co., 9 I. C. C. Rep. 78, (1901), (**296**).

Hay—Interstate Commerce Commission v. Lake Shore & M. S. R. Co., 134 Fed. 942; 206 U. S. 613, (1904), (**309**-B)

National Hay Ass'n. v. Lake Shore & M. S. R. Co., 9 I. C. C. Rep. 264, (1902), (**309**-A).

Hides—McMillan & Co. v. Western Classification Committee, 4 I. C. C. Rep. 276, (1890), (**118**).

Hogs—Chicago Board of Trade & Com. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, (1890), (**112**).

Hoops—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Hub-blocks—Hurlburt v. Lake Shore & M. S. R. Co., 2 I. C. C. Rep. 122, (1888), (**52**).

Bates v. Penn. R. Co., 4 I. C. C. Rep. 281, (1890), (**119**).

Laths—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (**368**).

Leather Scraps—Newman v. New York Cent. R. Co., 11 I. C. C. Rep. 517, (1906), (**414**).

Lemons—Consolidated Forwarding Co. v. Southern Pac. Co., 10 I. C. C. Rep. 590, (1905), (**371**).

Logs—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Lumber—Hurlburt v. Lake Shore & M. S. R. Co., 2 I. C. C. Rep. 122, (1888), (**52**).

Mahogany Lumber—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Masurite—Masurite Explosive Co. v. Pittsburg & L. E. R. Co., 13 I. C. C. Rep. 405, (1908), (**626**).

Medicine—(Patent) Warner v. New York C. & H. R. R. Co., 4 I. C. C. Rep. 32, (1890), (**104**).

Multigraphs—Forest City Fr. Bur. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 295, (1908), (**612**).

Packinghouse Products—Chicago Board of Tr. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, (1890), (**112**).

Paper Bags—Wolf Bros. v. Allegheny Val. Ry. Co., 7 I. C. C. Rep. 40, (1897), (**215**).

Patent Medicine—Warner v. New York C. & H. R. R. Co., 4 I. C. C. Rep. 32, (1890), (**104**).

Paving Blocks—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Pearline—Pyle & Sons v. East Tenn., Va. & Ga. R. Co., 1 I. C. C. Rep. 465, (1888), (**39**).

Petroleum and Petroleum Products—Rice, Robinson, Witherop v. Western N. Y. & Pa. R. Co., 4 I. C. C. Rep. 131, (1890), (**111**).

Marshall Oil Co. v. Chicago & N. W. R. Co., 14 I. C. C. Rep. 210, (1908), (**686**).

Pickets, Piles and Plan Beans and Handles—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Railroad Ties—Reynolds v. Western N. Y. & P. R. Co., 1 I. C. C. Rep. 393, (1888), (**35**).

Raisins—Martin v. Southern Pac. Co., 2 I. C. C. Rep. 1, (1888), (**46**).

Salt—Anthony Salt Co. v. Missouri Pac. Ry., 5 I. C. C. Rep. 299, (1892), (**153**).

Sawdust, Sleigh Wood, Spokes, Spools for Barb Wire, Staves—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Scraps—Myer v. Cleveland, C. C. & St. L. R. Co., 9 I. C. C. Rep. 78, (1901), (**296**).

Second-hand Dynamos—National Machinery & Wrecking Co. v. Pittsburg, C. C. & St. L. R. Co., 11 I. C. C. Rep. 581, (1906), (**422**).

Sectional Bookcases—Globe-Wernicke Co. v. Baltimore & O. S. W. R. Co., 11 I. C. C. Rep. 156, (1905), (**390**).

Shingles—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Shoe Brushes—Derr Manufacturing Co. v. Penn. R. Co., 9 I. C. C. Rep. 646, (1903), (**331**).

Soap—Pyle v. East Tenn., Va. & Ga. Ry., 1 I. C. C. Rep. 465, (1888), (**39**).

Beaver & Co., v. Pittsburg, C. & St. L. R. Co., 4 I. C. C. Rep. 733, (1891), (**131**).

Andrews Soap Co. v. Pittsburg, C. & St. L. R. Co., 4 I. C. C. Rep. 41, (1890), (**105**).

Procter & Gamble v. Cincinnati, H. & D. R. Co., 4 I. C. C. Rep. 87, (1890), (**109**).

Procter & Gamble v. Cincinnati, H. & D. R. Co., 9 I. C. C. Rep. 440, (1903), (**314**-A).

Interstate Commerce Commission v. Cincinnati, H. & D. R. Co., 146 Fed. 559, (1905), (**314**-B).

Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, (1907), (**314**-C).

Surgical Chairs—Harvard Co. v. Penn. Co., 4 I. C. C. Rep. 212, (1890), (**114**).

Vegetables—Rea c. Mobile & O. R. Co., 7 I. C. C. Rep. 43, (1897), (**216**).

Telegraph and Telephone Poles, Wagon Wood, Walnut Lumber, Window Stock—Duluth Shingle Co. v. Duluth, S. S. & A. R. Co., 10 I. C. C. Rep. 489, (1905), (**368**).

Wagon Material—Hurlburt v. Lake Shore & M. S. R. Co., 2 I. C. C. Rep. 122, (1888), (**52**).

Window Shades—Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 148, (1894), (**180**-A).

Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 548, (1896), (**180**-C).

Interstate Commerce Commission v. Delaware, L. & W. R. Co., 64 Fed. 723, (1894), (**180**-B).

Wire Brushes and Brooms—Forest City Fr. Bur. v. Ann Arbor R. Co., 13 I. C. C. Rep. 109, (1903), (**582**).

110. Miscellaneous Regulations Affecting Rates—Minimum Carload, Reweighing, Loading and Unloading Regulations.

In allowing carload rates, the carrier may properly stipulate for a minimum carload;[14] the more approved method being to charge a given rate per 100 pounds for any excess, rather than allow the shipper to load as much as he chooses in a car at a stated rate.[15] A maximum or minimum carload regulation should not vary with the size of the car offered by the carrier, where the shipper cannot readily secure cars of the size he requires.[16] A minimum carload rule is also unreasonable if the cars furnished cannot be loaded up to the required amount.[17]

When a rate is quoted as applying to a given minimum carload, shipments of the specified amount must be carried at that rate even though the freight be in fact hauled in two cars, each of smaller capacity than the required minimum.[18]

The Commission has passed on the reasonableness of a regulation for reweighing freight in case of dispute by the shipper, holding that overweights of one per cent. or 500 pounds must be corrected, and that the existing regulation correcting only overweights of two per cent. or 1,000 pounds was unreasonable.[19]

(14) See Tar. Circ. 15-A, Rule 77, (May 29th, 1907).

(15) Leonard v. Chicago & A. R. Co., 3 I. C. C. Rep, 241, (**85**).

(16) Suffern, Hunt & Co. v. Indiana, D. & W. R. Co., 7 I. C. C. Rep. 255, 282, (**232**).

See also Wiemer v. Chicago & N. W. R. Co., 12 I. C. C. Rep. 462, (**539**).

Georgia Stone Co. v. Georgia R. Co., 13 I. C. C. Rep. 401, (**625**).

American Lumb. Co. v. Southern Pac. Co., 14 I. C. C. Rep. 561, (**721**).

Carstens Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 577, (**721**).

(17) Cambria Steel Co. v. Great Nor. R. Co., 12 I. C. C. Rep. 466, (**540**).

Wiemer v. Chicago & N. W. R. Co., 12 I. C. C. Rep. 462, (**539**).

And see Consolidated F. Co. v. Southern Pac. R. Co., 10 I. C. C. Rep. 590, 607-8, 615, (**371**).

Romona Stone Co. v. Vandalia R. Co., 13 I. C. C. Rep. 115, (**583**).

Georgia Stone Co. v. Georgia R. Co., 13 I. C. C. Rep. 401, 403, (**625.**)

Romona Stone Co. v. Chicago, I. & L. R. Co., 13 I. C. C. Rep. 569, (**583**).

Tayntor Co. v. Montpelier & W. R. Co., 14 I. C. C. Rep. 136, (**676**).

(18) Pacific Pur. Co. v. Chicago & N. W. R. Co., 12 I. C. C. Rep. 549, (**559**).

(19) Rice v. Georgia R. Co., 14 I. C. C. Rep. 75, (**668**).

It has held that a regulation whereby shippers of lumber in open cars are required to stake and secure loads for safe carriage is not unreasonable, the rate being presumably made with reference to this requirement.[20]

The Commission has said that there is no absolute rule requiring that either a carrier or shipper should unload carload freight, and that what is a reasonable regulation may well vary in different localities and with different commodities. It has held that in cases of fruit and vegetables at Chicago, the carrier is bound to make delivery at the car doors no matter whether the carload is owned entirely by one person or is consigned to a general consignee for distribution among a number of owners. In this case it was also held that the carrier was not bound to provide platforms for assorting carload freight consigned to distributing agents, and that if it did so, it might make a reasonable charge for the service.[21]

(20) National Lumb. D. Ass'n. v. Atlantic C. L. R. Co., 14 I. C. C. Rep. 154, (678).

See also Hezel Milling Co. v. St. Louis A. & T. H. R. Co., 5 I. C. C. Rep. 57, 67, (140).

(21) Wholesale Fruit and Produce Ass'n. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 410, (205).

See also Hezel Milling Co. v. St. Louis A. & T. H. R. Co., 5 I. C. C. Rep. 57, 67, (140).

And cf. Penna. St. Mil. As. v. Phila. & R. R. Co., 8 I. C. C. Rep. 531, (283).

CHAPTER X.

JUST AND REASONABLE CHARGES—SERVICES INCIDENTAL TO TRANSPORTATION PROPER.

111. Provisions of the Act Covering Incidental Services.
112. Refrigeration Charges.
113. Demurrage Charges.
114. Reconsignment Charges.
115. Switching, Storage, Terminal, and Elevation Charges.

111. Provisions of the Act Covering Incidental Services.

By the Cullom Act, the term "transportation" was defined in the second paragraph of Section 1 merely as including "all instrumentalities of shipment or carriage." This was amended in 1906 to read as follows:

"The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

The original Act probably covered, however, all the services specified in the Amendment.[1] Both the original and amended Act require that all or any part of charges for services rendered "in connection with" transportation be reasonable.

112. Refrigeration Charges.

Under the original Act the Commission held that although it was the duty of the railroads to furnish refrigeration for such commodities as necessarily required it, yet this duty did not arise

(1) See infra, §§112-115.

See also Fielder v. Missouri, K. & T. Ry. Co., 42 S. W. 362, (1897), (Tex. Civ. App.)

State v. Atchison, T. & S. F. R. Co., 176 Mo. 687; 75 S. W. 776; 63 L. R. A. 761, (1903).

from the Act, and the Commission had therefore no power to require the road to furnish such service.[2]

Even under the Cullom Act, however, the Commission had jurisdiction to inquire into the justice and reasonableness of charges for refrigeration, just as in the case of other charges for the transportation of passengers or property.[3]

The amended Act, as above quoted, makes it the statutory duty of the carrier to provide refrigeration. The Commission now has jurisdiction, therefore, not merely to pass upon the reasonableness of refrigeration charges, but also to require that refrigeration be given when necessary.

There are three possible methods of computing refrigeration charges. The railroad may charge for the ice actually used at so much per ton; or for the service of refrigeration at so much per car, no matter how much ice be consumed; or may charge a freight rate per hundred pounds to include icing. In a case decided prior to 1906 the Commission said that there were advantages and disadvantages in each of these methods, and that it was not within its province to prescribe the method to be adopted, it being concerned only with the question as to whether the rate charged the shipper was fair.[4]

113. Demurrage Charges.

The Commission has held that demurrage is in the nature of a penalty, imposed for the purpose of keeping the tracks clear, and that this charge may properly exceed the reasonable rental of the

(2) Re Transportation of Fruit, 10 I. C. C. Rep. 360, 373, 374, (357-A).

Compare Scofield v. Lake Shore & M. S. R. Co., 2 I. C. C. Rep. 90, 116, (51).

(3) Truck Farmers' Ass'n. v. North Eastern Ry. of S. C., 6 I. C. C. Rep. 295, 316, (191-A).

Re Transportation of Fruit, 10 I. C. C. Rep. 360, 374-375, (357-A).

Consolidated F. Co. v. Southern P. R. Co., 10 I. C. C. Rep. 590, 615, (371).

Re Transportation of Fruit, 11 I. C. C. Rep. 129, 141, (357-B).

See, however, Consolidated F. Co. v. Southern P. R. Co., 9 I. C. C. Rep. 182, 206e, (302-A).

(4) Re Transportation of Fruit, 11 I. C. C. Rep. 129, 141, (357-B).

See also Waxelbaum v. Atlantic C. L. R. Co., 12 I. C. C. Rep. 178, 183, (492).

car. A charge of $1.00 per day has been upheld as reasonable, although the rental value of the car was but 20 cents per day.[5]

It has also been held that a demurrage charge is properly made on private cars kept on the railroad siding. A charge of $1.00 per day after the first 96 hours was held not unreasonable.[6] Demurrage may not be charged on private cars, however, when standing on private tracks, whether such tracks be owned by the consignor or by the consignee.[7]

114. Reconsignment Charges.

A charge of $2.00 per car on grain reconsigned to Kansas City from the railroad "hold-tracks" was held not unreasonable, in view of the extra expense incurred and of the extra service performed by the railroads.[8]

In one case the Commission held that the railroads should not charge more than the cost of service for the privilege of reconsigning, after unloading at St. Louis, hay destined for Southern points,[9] and awarded reparation for excess charges. The ele-

(5) Kehoe & Co. v. Charleston & N. C. R. Co., 11 I. C. C. Rep. 166, (391).

See also MacBride v. Chicago, St. P., M. & O. R. Co., 13 I. C. C. Rep. 571, (644).

Wilson Co. v. Penna. R. Co., 14 I. C. C. Rep. 170, 175, (680).

New York Hay Ex. v. Penna. R. Co., 14 I. C. C. Rep. 178, 184-185, (681).

(6) Michie v. New York, N. H. & H. R. Co., 151 Fed. 694, (455).

Cudahy Co. v. Chicago & N. W. R. Co., 12 I. C. C. Rep. 446, (535).

See also Waxelbaum v. Atlantic C. L. R. Co., 12 I. C. C. Rep. 178, 185-186, (492).

Kehoe v. Nashville, C. & St. L. R. Co., 14 I. C. C. Rep. 555, (720).

(7) Re Demurrage Charges on Tank Cars, 13 I. C. C. Rep. 378, (622).

See also Admin. Rul. No. 79 for a definition of private cars and of private side tracks as the terms are used in this opinion. The Commission has said that it did not intend to give this ruling a retroactive effect and will regard with disfavor claims for reparation on account of demurrage charges previously collected. (Supp. No. 1 to Tar. Circ. 15-A, pp. 8-9).

(8) Kansas City Bd. of Tr. v. Chicago, B. & Q. R. Co., et al., 12 I. C. C. Rep. 173, (491).

See also Beekman Co. v. St. Louis S. W. R. Co., 14 I. C. C. Rep. 532, (718).

(9) St. Louis, H. & G. R. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 102, (384-A).

ment of discrimination undoubtedly influenced the Commission in this case.

The legality of reconsignment rates as a preference of reconsigned traffic over local freight is discussed elsewhere.[10]

115. Switching, Storage, Terminal and Elevation Charges.

The haul from a regular suburban station to the central junction of the railroad company has been held not properly to be the subject of a switching charge.[11]

A railroad may properly exact higher charges for storage than regular Warehouse Companies, as this, like a demurrage charge, is in the nature of a penalty imposed for the purpose of keeping the stations clear of freight.[12]

A $2.00 charge at Chicago on each car of cattle coming from Southern points was held by the Commission to be unreasonable to the amount of $1.00, as to territory where a reduction in rates, recently enforced, did not apply.[13]

(10) See infra, §189.

(11) Chicago Fire Proof, etc., Co. v. Chicago & N. W. R. Co., 8 I. C. C. Rep. 316, (269).

Blackman v. Southern Ry. Co., 10 I. C. C. Rep. 352, 358, (356).

(12) Wilson Co. v. Penna. R. Co., 14 I. C. C. Rep. 170, 175, (680).

Cattle Raisers' Ass'n. v. Fort Worth & D. C. R. Co., 7 I. C. C. Rep. 513, 555a, (245-A).

Cattle Raisers' Ass'n. v. Chicago, B. & Q. R. Co., 10 I. C. C. Rep. 83, (245-F).

(13) Cattle Raisers' Ass'n. v. Missouri, K. & T. R. Co., 11 I. C. C. Rep. 296, (399-A); 13 I. C. C. Rep. 418, (399-C); (but see 399-D and 399-E).

Cattle Raisers' Ass'n. v. Chicago B. & Q. R. Co., 11 I. C. C. Rep. 277, (245-G).

Cattle Raisers' Ass'n. v. Chicago, B. & Q. R. Co., 12 I. C. C. Rep. 507, (245-I).

In the latter case the Commission reviews the litigation on this question.

As to legality of such charges see also Walker v. Keenan, 73 Fed. 755; 13 C. C. A. 668; 34 U. S. App. 691, (184-B).

Covington Stk. Yds. v. Keith, 139 U. S. 128; 11 Sup. Ct. 461; 35 L. Ed. 73, (123).

I. C. C. v. Chicago, B. & Q. R. Co., 94 Fed. 272, (245-B); 98 Fed. 173, (245-C); 103 Fed. 249; 43 C. C. A. 209, (245-D); 186 U. S. 320; 46 L. Ed. 1182; 22 Sup. Ct. 824, (245-E).

Stickney v. I. C. C., 164 Fed. 638, (399-D).

Missouri, K. & T. R. Co. v. I. C. C., 164 Fed. 645, (399-E).

In determining the reasonableness of terminal charges, such charges must be considered by themselves, apart from the transportation performed prior to the commencement of the terminal service.[14]

Elevation of grain is one of the facilities which the carrier may provide for its patrons but this must be done under the restrictions which the Act imposes, as regards reasonableness, equality, and publication of charges.[15]

(14) Stickney v. I. C. C., 164 Fed. 638, (399-D).

(15) Re Allowances to Elevators, 12 I. C. C. Rep. 85, (351-B).
In this case Commissioner Harlan defined "elevation" as follows:
"The unloading of grain from cars, or from grain carrying vessels, into a grain elevator and loading it out again after a storage for a period of not to exceed 10 days."

CHAPTER XI.

DISCRIMINATIONS AND PREFERENCES—GENERAL SCOPE OF THE PROHIBITION.

116. Reasons for the Prohibition of Discriminations and Preferences.
117. Provisions of the Act.
118. Distinction Between Sections 1, 2, 3 and 4.
119. Present Scheme of Treatment of the Subject.
120. General Statements as to Discriminations and Preferences.
121. Not all Discriminations and Preferences Prohibited.
122. Same Facilities Need not be Furnished at all Points.
123. The above Provisions of the Act Relate only to Performance of Duties of a Common Carrier.
124. Distinction between Standards of Charge under Sections 2 and 3, and under Section 6.
125. Passes—Mileage Commutation and Excursion Tickets—General Rules.
126. Practices Tending to Produce Discriminations Condemned.
127. Must Discriminations or Preferences be between Competitive Shippers or Commodities?
128. Same Subject—Cases under Section 2.
129. Same Subject—Cases under Section 3.
130. Same Subject—Conclusion from the Cases.
131. Discriminations by a Carrier in Favor of Itself.
132. Same Subject—Carriers Acting also as Dealers in Commodities Transported.
133. Same Subject — Confusion between the two Classes of Cases above Mentioned.
134. Same Subject — How Far Carriers are Entitled to Consult their own Interest in Fixing Relative Rates Producing Discriminations.
135. Discriminations Between Competitive Commodities.

116. Reasons for the Prohibition of Discriminations and Preferences.

The principal evils which led to the passage of the Interstate Commerce Act were two: Discrimination by the railroads in favor of certain large and powerful shippers, in order to secure their traffic from competing lines, accomplished for the most part by secret rates and rebates; and open preference in rates of large trade centers, especially in the South, over the smaller outlying points, induced principally by the stronger railroad and market competition at the former.

For these evils the common law furnished no adequate remedy. Although the weight of authority was to the effect that the carrier was bound, at common law, to charge equal rates to all similarly situated,[1] yet the machinery of the common law was entirely inadequate to enforce compliance with this requirement. The important changes in the common law effected by the Act were, therefore, not in regard to the substantive provisions of the law, but in the creation of adequate remedies to enforce these requirements and in penal provisions to prevent their infraction.

117. Provisions of the Act.

The main provisions of the Act defining the duty of carriers to refrain from preferences and discriminations are contained in Sections 2, 3, and 4.[2] They are as follows:

"Section 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any ser-

(1) For a summary of the requirements of the common law and of the defects therein see supra, §§9-12. As this work deals only with the Interstate Commerce Act and does not purport to state the law in jurisdictions where that Act does not apply, it is not deemed expedient to cumber it with the citations of the many common law cases or of state statutes dealing with matters covered by the Act itself.

The better authorities held that even at common law carriers were bound, in addition to the requirement that rates be reasonable, to allow equal rates and facilities to all shippers equally situated, (see I. C. C. v. Baltimore & O. R. Co., 145 U. S. 263, 275-276; 36 L. Ed. 699; 12 Sup. Ct. 844), (91-C). These authorities are collected in convenient form in Beale & Wyman on Railroad Rate Regulation, §724, in Hutchinson on Carriers, §521 et seq., and in Judson on Interstate Commerce, §148. Two of the best opinions are those in Messenger v. Penn. R. Co., 36 N. J. L. 407, 13 Am. St. Rep. 437, (1874), and Scofield v. Lake Shore & M. S. R. Co., 43 Oh. St. 571, 3 N. E. 907, 54 Am. St. Rep. (1885). The cases holding the opposite view, that the carrier's only duty was to allow reasonable rates are collected in Beale & Wyman, §716, Hutchinson, §521. A typical opinion so holding is that in Johnson v. Pensacola & R. R. Co., 16 Fla. 623, 26 Am. St. Rep. 731, (1878); see also Lundquist v. Grand Tr. W. R. Co., 121 Fed. 915, (294).

(2) These sections remain as adopted in the Cullom Act, never having been changed by any of the later amendments.

The English statutes on which these provisions were modelled are quoted and discussed, infra, Chap. XII, note 5.

vice rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Section 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . . .[3]

"Section 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act."[4]

(3) The last paragraph of Sec. 3 dealing with discriminations between connecting lines is discussed in a separate chapter, infra, Chap. XVIII.

(4) In addition to these provisions, the Hepburn Act added to Sec. 6 a proviso permitting preference of the United States over all traffic in time of war, for transportation of troops, etc. Sec. 22 also provides exceptions to the rule requiring equality of treatment, and Par. 4 of Sec. 1, as amended by the Hepburn Act, contains a specific prohibition of the

118. Distinction Between Sections 1, 2, 3 and 4.

The principles contained in these provisions are, with the possible exception of the long and short haul clause,[5] but the logical result of the legal status of the common carrier, and, as business conditions demanded, they might well have been developed by the Courts without the aid of a statute.

While the reasonableness of charges under Section 1 of the Act is tested to a large extent by a comparison with other rates or charges, under Sections 2 and 3 the rate or practice in question is viewed solely in its relation to charges for similar services rendered to other passengers, shippers, or localities. Section 1 requires that all charges be reasonable; Sections 2 and 3 that all patrons and localities similarly situated be treated alike.

Section 2 was evidently aimed at the prevailing discriminations among individuals by means of rebates,[6] etc., while Sections 3 and 4 were directed rather at the "trade-centre" system of rate making and the preference of one locality over another. If Section 2 had been so framed as to cover all discriminations, of every kind, in favor of individuals or classes of individuals, and if Section 3 had related solely to preferences of one locality over an-

giving of free passes except to certain persons. The two latter provisions are discussed, infra, §§157-159.

The question of criminal or penal liability for discriminations and preferences is dealt with in Chap. XXVII. As to whether or not the penalty for allowing free passes prescribed in Sec. 1 is exclusive of that in Sec. 10 or in the Elkins Act, see infra, §352.

(5) Sec. 4, as interpreted by the Courts, really adds little to the Act, the greater charge for the less distance being merely an instance of a preference of a locality under Sec. 3. See infra, §§182, 208. The prohibition against preferences between localities at first sight might perhaps seem to involve a new principle, but even this would appear to be but a deduction from the carrier's duty to treat the public impartially.

(6) See Cattle R. Ass'n. v. Fort W. & D. C. R. Co., 7 I. C. C. Rep. 513, 539-540, (245-A).

Phillips Bailey & Co. v. Louisville & N. R. Co., 8 I. C. C. Rep. 93, 96, (259).

Chicago F. P. Cov. Co. v. Chicago & N. W. R. Co., 8 I. C. C. Rep. 316, 329, (269).

Penna. Millers' Ass'n. v. Phila. & R. R. Co., 8 I. C. C. Rep. 531, 551, (283).

Re Party Rate Tickets, 12 I. C. C. Rep. 95, (474), and cases cited.

I. C. C. v. Western & Atlantic R. Co., 88 Fed. 186, 197, (154-B).

other, the present branch of the subject might properly be divided in accordance with the sections of the Act. Section 2, however, does not cover all kinds of favoritism among individuals, referring only to discriminations in charges, and leaves it to Section 3 to forbid the giving of all other sorts of advantages among shippers,[7] in reference to such matters as car distribution, switches, etc., while Section 4 has been so construed as to make it merely a specific instance of the preference of a locality already forbidden by Section 3. Although the Courts have never drawn a clear distinction between cases involving discriminations among individuals and those involving preferences among localities, they have nevertheless ruled that different factors enter into the determination of the legality of the one from those properly applicable to the other.

119. Present Scheme of Treatment of the Subject.

In view of this overlapping of Sections 2 and 3, it has been found impracticable to follow the division of the Act, and the subject has therefore been divided so as to permit a logical treatment of the different problems presented. Certain principles and distinctions are first discussed which are applicable alike to discriminations among individuals and to preferences among localities, and which illustrate the scope of the general requirement that all persons and places must be treated alike under similar circumstances. Next, the decisions are reviewed which distinguish between the different factors entering into the legality of the two, and which define the rules of law applicable to each. Finally, the cases involving discriminations among individuals are taken up separately from those involving preferences among localities.

Discriminations among individuals have been further divided under three heads: (1) Discriminations among individuals by direct differences in charges; (2) discriminations in charges among individuals, by means of rebates or other devices; (3) discriminations among individuals in reference to transportation matters other than charges proper. The first two divisions of the latter classification are covered by both Sections 2 and 3 of the Act, while the last comes only within the broader provisions of Sec-

(7) Sec. 3 applies, however, to discriminations in rates between shippers as well as to preferences in furnishing facilities.
U. S. v. Tozer, 39 Fed. 904, 906-907, (70-C).

tion 3. The long and short haul provision of Section 4 is treated merely as an instance of a preference between localities.[8]

120. General Statements as to Discriminations and Preferences.

"The common carrier has no right to select either goods or customers. . . . . He must know no friends, and concede no unequal favors." [9]

"Common carriers are bound by every principle of justice and of law to accord equal rights to all shippers who are entitled to like treatment, both in the receiving of supplies and shipment of their products; and a carrier who, under any pretext whatsoever, grants to one shipper an advantage which it denies to another, violates the spirit and thwarts the purpose of the law." [10]

"It is neither sound in principle nor equitable in practice for railway lines to create artificial differences in market conditions by an arbitrary differential in rates whereby the product of one section of the country is assigned to one market and the product of another section to another market." [11]

There cannot be unjust discrimination or undue preference or prejudice in refusing a service that the carrier has no right by statute or by contract to perform, so that a railroad having trackage rights over the line of another for through traffic only does not violate the Act by refusing local service.[12]

In Crews *v.* Richmond & D. R. Co., [13] Chairman Cooley said: "Discrimination must consist in the doing for or allowing to

(8) The decisions under the second paragraph of Sec. 3, with reference to the allowance of equal facilities to connecting lines are discussed in a separate chapter, infra, Chap. XVIII.

(9) Walker, C., in Riddle, Dean & Co. v. New York, L. E. & W. R. Co., 1 I. C. C. Rep. 594, 603, 604, (43).

(10) Yeomans, C., in Castle v. Baltimore & O. R. Co., 8 I. C. C. Rep. 333, 345, (271).

See also Eichenberg v. Southern Pac. Co., 14 I. C. C. Rep. 250, 269, (691).

(11) Clements, C., in Re Export Rates, etc., 8 I. C. C. Rep. 185, 210, (264).

(12) Alford v. Chicago, R. I. & P. R. Co., 3 I. C. C. Rep. 519, 531-533, (95).

(13) 1 I. C. C. Rep. 401, 426, (36).

one party or place what is denied to another; it cannot be predicated of action which in itself is impartial."

A discrimination or preference is not justified merely by the fact that the carrier may withdraw the advantage from the favored shipper at will.[14]

121. Not all Discriminations and Preferences Prohibited.

Not every discrimination or preference is prohibited, but only such discriminations as are unjust, and such preferences as are undue and unreasonable.[15] A greater charge for a less distance is forbidden only when the traffic to the two points is carried "under substantially similar circumstances and conditions." In the first important case considered by the Commission, it was held that where the circumstances were dissimilar the carrier was free to make a greater charge for the less distance of its own motion, and that in such case the discrimination or preference produced was not unjust or undue and hence not forbidden.[16]

122. Same Facilities Need not be Furnished at all Points.

Carriers are not bound to furnish the same terminal facilities for all traffic,[17] or to provide stations at every point which a shipper may request, or a yard where every connecting road desires to interchange traffic.[18] They need merely provide suitable depots, yards, etc., for all freight which they profess to haul.[19]

(14) Red Rock Fuel Co. v. Baltimore & O. R. Co., 12 I. C. C. Rep, 438, 451, (404).

Butchers Co. v. Louisville & N. R. Co., 67 Fed. 35, 41-42; 14 C. C. A. 290; 31 U. S. App. 252, (194).

(15) Pittsburg Plate Gl. Co. v. Pittsburg C. C. & St. L. R. Co., 13 I. C. C. Rep. 87, 99, (578).

U. S. ex rel. v. Oregon, R. & N. Co., 159 Fed. 975, 978, (587).

See also U. S. v. Wells Fargo Exp. Co., 161 Fed. 606, 610, (636).

The omission of the word "unjust" in the Elkins Act does not broaden the provision.

(16) Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, (13).

This construction of the Act has always been followed by the Courts.

(17) Palmers Dock Co. v. Penna. R. Co., 9 I. C. C. Rep. 61, 66, (293).

(18) Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 622-623; 2 L. R. A., 289, (57-B).

(19) See Covington Stk. Yds. v. Keith, 139 U. S. 128; 35 L. Ed. 73; 11 Sup. Ct. 461, (123).

123. The Above Provisions of the Act Relate Only to Performance of Duties qua Common Carrier.

The prohibition of preferences and discriminations relates only to such discriminations and preferences as are incident to the performance of the duties of a common carrier,[20] and does not prevent a railroad, when not performing such duties, from dealing exclusively with one individual. Thus it may properly lease all its refrigerator cars from one company, though the latter be also a large shipper,[21] or may refuse to haul a certain make of private cars,[22] or may agree to send all the live stock shipped over its line to or from a certain point through a certain stockyards, to the exclusion of a rival stockyards company situated at the same point;[23] or it may give a certain hack driver exclusive privileges for securing the patronage of its passengers in its depots.[24]

(20) In American Warehousemen's Ass'n. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, 589, (**247**), Yeomans, C., said: "The function of a carrier is to receive, transport and deliver."

(21) Consolidated Forwarding Co. v. Southern Pac. R. Co., 9 I. C. C. Rep. 182, 206e, (**302**-A).

Re Transportation of Fruit, 10 I. C. C. Rep. 360, 373-4, (**357**-A).

U. S. ex rel. Morris v. Delaware, L. & W. R. Co., 40 Fed. 101, (**87**).

Compare Eichenberg v. Southern Pac. R. Co., 14 I. C. C. Rep. 250, (**691**).

(22) Worcester Car Co. v. Penna. R. Co., 3 I. C. C. Rep. 577, (**97**).

In this case Commissioner Bragg said (p. 581):

"The tracks of a railroad company are not a common highway upon which any one can enter and use his own vehicle of transportation against the objection of the company."

See also Michigan Congress Water Co. v. Chicago & G. T. R. Co., 2 I. C. C. Rep. 594, (**74**).

New York T. O. Ass'n. v. Southern Pac. R. Co., 12 I. C. C. Rep. 204, 208, (**497**).

Ruttle v. Pere M. R. Co., 13 I. C. C. Rep. 179, 185, (**595**).

(23) Kentucky R. Com. v. Louisville & N. R. Co., 10 I. C. C. Rep. 173, (**343**).

Butchers, etc., Co. v. Louisville & N. R. Co., 67 Fed. 35; 14 C. C. A. 290; 31 U. S. App. 252, (**194**).

Central Stock Yards Co. v. Louisville & N. R. Co., 118 Fed. 113; 63 L. R. A. 213; 55 C. C. A. 63, (**300**-B); 192 U. S. 568; 24 Sup. Ct. 339; 48 L. Ed. 565, (**300**-B).

But see Keith v Kentucky C. R. Co., 1 I. C. C. Rep. 189, (**26**).

(24) Donovan v. Penna. Co., 120 Fed. 215, 218; 57 C. C. A. 362; 61 L. R. A. 140, (1903); 199 U. S. 279; 26 Sup. Ct. 91; 50 L. Ed. 192, (1905).

See also Delaware, L. & W. R. Co. v. Kutter, 147 Fed. 51, 63, (1906).

In Donovan *v.* Penna. R. Co., above cited, Judge Baker said:

"Whatever a railroad company does as a common carrier, it is compelled to do for all without discrimination. Whatever it may lawfully do outside its obligations as a common carrier is a matter of favor. And by the term, favor goes not by right."

As to whether the Act prohibits a carrier from discriminating in favor of a particular compress company there would appear to be some doubt. The point does not seem to have been considered in Chickasaw Compress Co. *v.* Gulf, C. & S. F. R. Co.,[25] although seemingly presented by the facts involved. It would seem that unless a question of preference among localities is involved, the Act does not prevent a carrier from throwing all its compression business to one party, any more than its cab business.

124. Distinction Between Standards of Charge Under Section 2 and 3, and Under Section 6.

In order to constitute a violation of the prohibition of Section 2 against different charges to different persons, it must appear that one individual has actually received some transportation service at a less charge than another,[26] and such is not the case where

(25) 13 I. C. C. Rep. 187, (596).

See also Muskogee Com. Cl. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 312, (514).

Union Sp. Com. Ass'n. v. Louisville & N. R. Co., 12 I. C. C. Rep. 372, (521).

In the Muskogee case the Commission does not make it entirely clear whether the decision was rested on the ground that the case was one involving a preference of South McAlester over Muskogee, or was one where the compress business was a mere device to aid shippers owning compresses. If it were a case involving a preference between two localities, competition would seem to have been a proper justification, and the fact that this defense was rejected by the Commission would seem to make the decision one which must be considered as involving an illegal device.

(26) Griffee v. Burlington & Mo. R. Co., 2 I. C. C. Rep. 301, (60).

De Bary Baya Merchants' Line v. Jacksonville, T. & K. W. R. Co., 40 Fed. 392, (1889).

Re Huntington, 68 Fed. 881, (1895).

U. S. v. Hanley, 71 Fed. 672, (202).

See also Richmond Elevator Co. v. Pere M. R. Co., 10 I. C. C. Rep. 629, (372).

it merely appears that a less rate was offered to others, no shipment ever having been made at the reduced rate.[27]

The standard of charge under Sections 2 and 3 is not the rate filed, but that charged other shippers or localities. In Chicago & A. R. Co. *v.* U. S., [28] Judge Baker said:

"Under the Cullom Act (1887) the standard of comparison was the treatment of other shippers. It was necessary to prove not only that the favored shipper really paid less than the published rate, but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed."

The above statement clearly illustrates the distinction between the carrier's duty under Section 6, and that under Sections 2 and 3, but it is not accurate in its intimation that there was no violation of the Act of 1887 without proof of a different charge to different persons.[29]

Under Sections 2 and 3 the filing or not filing of the rate is immaterial and the only question is whether or not the railroad has accorded one of its patrons different treatment from that accorded another.[30] In recent years it has been recognized that the provisions establishing the published rate as the standard of charge are so much more effective in putting a stop to discriminations than the mere requirement of equal treatment, that in almost all the late cases the legality of the practice hinges entirely on compliance with Section 6, and Sections 2 and 3 are thus very much less important than in the early days, before these principles were thoroughly understood.

(27) Lehigh Valley R. Co. v. Rainey, 112 Fed. 487, (1902).
Missouri & K. S. A. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 483, (545).
Topeka B. D. Ass'n. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 620, 627, (653).

(28) 156 Fed. 558, 562; 84 C. C. A. 324, (430-B).

(29) See infra, §230, note 5.

(30) U. S. v. Vacuum Oil Co., 153 Fed. 598, 607-8, (468).
Chicago & A. R. Co. v. U. S., 156 Fed. 553, 560; 84 C. C. A. 324, (430-B).

125. Passes—Mileage, Commutation and Excursion Tickets—General Rules.

The giving of a free pass to one not within the exceptions of Sections 1 and 22 would seem to be a violation of Sections 2 and 3.[31] Although by the express provisions of Section 22 the issuance of mileage, excursion, or commutation tickets is proper, such tickets must be offered to the public generally without discrimination.[32]

It is not an illegal discrimination for a railroad which has allowed special excursion rates for the benefit of a certain political convention in one month, to refuse an excursion to another political party in the next month, since a road is free to have excursions when it pleases.[33]

126. Practices Tending to Produce Discriminations Condemned.

Any practice which, although not in itself illegal, would furnish an opportunity and a temptation for discrimination, is looked on with disfavor by the Commission and the Courts.[34] The mere

(31) Re Carriage of Persons Free by Boston & M. R. Co., 5 I. C. C. Rep. 69, (1891).

Harvey v. Louisville & N. R. Co., 5 I. C. C. Rep. 153, (**144**).

Milk Prod. Ass'n. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 163, (**220**).

Re Charge to Grand Jury, 66 Fed. 146, (1895).

See also infra, §157, for a fuller discussion of free passes; also infra, §352, as to whether the free pass provision introduced by the Hepburn Amendment provides exclusive penalties.

(32) Larrison v. Chicago & G. T. R. Co., 1 I. C. C. Rep. 147, (**21**).

Ass'd. Wholesale Gr. v. Missouri Pac. R. Co., 1 I. C. C. Rep. 156, (**23**).

Cf. also Re Party Rates. 12 I. C. C. Rep. 95, (**474**).

And cases infra, §§158 and 234.

(33) Cator v. Southern Pac. R. Co., 6 I. C. C. Rep. 113, (**175**).

(34) Re Passenger Tariffs, 2 I. C. C. Rep. 649, (1889).

See Consolidated Forwarding Co. v. Southern Pac. R. Co., 9 I. C. C. Rep. 182, 206, (**302**-A); but see 200 U. S. 536, 556; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302**-E).

Montgomery Fr. Bur. v. Western Ry. of Ala., 14 I. C. C. Rep. 150, (**677**).

Lundquist v. Grand Tr. W. R. Co., 121 Fed. 915, (**294**).

Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 221, (1907).

A contract between a railroad and a ticket broker under which the latter can sell tickets at less than tariff rates, has been held void.

fact, however, that, under a certain rule or practice adopted by the railroads, violations of the Act may occur, is not in itself sufficient to render that rule illegal.[35]

127. Must Discriminations or Preferences be Between Competitive Shippers or Commodities?

One of the questions under Sections 2 and 3, as to which the expressions of the Commission and the Courts might give rise to some confusion, is whether or not illegal discrimination or preference can be produced by a difference in charges or services to persons not in competition with one another. In a number of the Commission's decisions, it has been said, or intimated, that there can be no discrimination or preference in rates on non-competitive commodities.[36]

128. Same Subject—Cases Under Section 2.

The above conclusion would not appear to be applicable to cases arising under Section 2. As a general rule most of these cases concern different rates charged competing shippers. But Section 2 does not merely forbid a difference in rates between com-

Raleigh & G. R. Co. v. Swanson, 102 Ga. 754; 28 S. E. 601; 39 L. R. A. 275, (1897).

See also Parks v. Dold Co., 6 Misc. (N. Y.) 570; 4 Int. Com. Rep. 486, (1894).

See also infra, Chap. XIX, §244, as to the invalidity of contracts producing discriminations and transportation at less than tariff rates.

(35) Southern Pac. R. Co. v. I. C. C., 200 U. S. 536, 556; 26 Sup. Ct. 330; 50 L. Ed., 585, (302-E).

(36) Rice v. Cincinnati, W. & B. R. Co., 5 I. C. C. Rep. 193, 212, (147).

Kentucky R. Com. v. Louisville & N. R. Co., 10 I. C. C. Rep. 173, 190, (343).

Miner v. New York, N. H. & H. R. Co., 11 I. C. C. Rep. 422, 427, (403).

Clark Co. v. Lake Shore & M. S. R. Co., 11 Rep. 558, 577, (420).

National L. D. Ass'n. v. Atlantic C. L. R. Co., 14 I. C. C. Rep. 154, 163, (678).

Wilson Co. v. Penna. R. Co., 14 I. C. C. Rep. 170, 176, (680), and cases cited.

U. S. v. Chicago & N. W. R. Co., 127 Fed. 785, 791; 62 C. C. A., 465, (332).

See also Southern Pac. Co. v. I. C. C., 200 U. S. 536, 555-556; 26 Sup Ct. 330; 50 L. Ed. 585, (302-E).

petitive commodities. It forbids any difference in charges for like services under similar circumstances. If an Ohio farmer be charged less for carrying a horse from New York to Columbus than is charged a New York stock-broker for the same service, this is a clear violation of the provision. So also, almost all passenger rates are practically non-competitive, yet a road may not legally carry a Senator cheaper than a day laborer, and to carry a Methodist minister at a less rate than that charged a Baptist would be clearly illegal.[37]

129. Same Subject—Cases Under Section 3.

Under Section 3 there are a few cases of an undue preference or advantage to a shipper or locality not in competition with the complaining party. Indeed it might be said that the use of the words "preference or advantage" and "prejudice or disadvantage" in itself implied that the Section is violated only in cases where what the favored party gained by the preference, his rival lost.[38] As said by Commissioner Prouty in Kentucky R. Co. *v.* Louisville & N. R. C. Co., [39]

"A discrimination under the third section to be undue must or-

(37) U. S. v. Chicago & N. W. R. Co., 127 Fed. 785, 790; 62 C. C. A. 465, (332).

See Re Party Rates, 12 I. C. C. Rep. 95, (474).

Pittsburg C. C. & St. L. R. Co. v. Baltimore & O. R. Co., 3 I. C. C. Rep. 465, 471, (91-A).

(38) This is the interpretation placed by the English Courts on the Undue Preference Clause in the Act of 1854, on which Sec. 3 of our Act was modelled.

See Hozier v. Cal. R. Co., 1 Ry. & Can. Tr. Cas. 27, (1855).

Caterham R. Co. v. L. B. & S. R. Co., 1 Ry. & Can. Tr. Cas. 32, (1856). 26 L. J. C. P. 16.

Jones v. Eastern Co. R. Co. 1 Ry. & Can. Tr. Cas. 45, (1858).

Innes v. L. B. & S. C. R. Co., et al., 2 Ry. & Can. Tr. Cas. 155, (1875).

Nitshill Coal Co. v. Cal. R. Co., 2 Ry. & Can. Tr. Cas. 39, (1874).

Foreman v. G. E. R. Co., 2 Ry. & Can. Tr. Cas. 202, (1875).

Lees v. L. & Y. R. Co., 1 Ry. & Can. Tr. Cas. 352, (1874).

Broughton Co. v. G. W. R. Co., 4 Ry. & Can. Tr. Cas. 191, (1883).

Merry v. G. S. & W. R. Co., 4 Ry. & Can. Tr. Cas. 383, (1884).

(39) 10 I. C. C. Rep. 173, 190, (343).

See also I. C. C. v. Chicago, G. W. R. Co., 141 Fed. 1003, 1014. (364-B).

dinarily be such that the prejudice arising out of it against one party is a source of advantage to the other." [40]

The Commission itself has held, however, that the Act requires a railroad which sells first-class passenger tickets to colored persons, to furnish them with as good accommodation as those afforded white passengers.[41] This duty cannot well be found in Section 2, unless that provision be stretched to include all the matters covered by Section 3.

In another case the Commission awarded damages for defendant's refusal to furnish cars for railroad ties going off its own line, where cars were at the same time furnished for lumber and stone. These commodities could hardly be said to be competitive.[42]

130. Same Subject—Conclusion from the Cases.

Where two articles are not only different in kind, but also non-competitive, their transportation differs not only in respect to the cost of the service, but also as to its value, and it is practically impossible to set up the rate on one as the standard of that to be charged on the other; also, it is manifestly more unjust to charge different rates among competing localities or shippers than where one does not profit by the other's loss. As a practical matter this consideration always affects the attitude of the Commission or Court in passing on a given case.[43] This thought is evidently what the Commission and the Court had in mind in the opinions referred to in § 127.

(40) Compare Howell v. New York, L. E. & W. R. Co., 2 I. C. C. Rep. 272, 299, (**59**).

(41) Councill v. Western & Atl. R. Co., 1 I. C. C. Rep. 339, (**33**).
Heard v. Georgia R. Co., 1 I. C. C. Rep. 428, (**37**).
Heard v. Georgia R. Co., 3 I. C. C. Rep. 111, (**79**).
Edwards v. Nashville, C. & St. L. R. Co., 12 I. C. C. Rep. 247, (**506**).
And compare McQuinn v. Forbes, 37 Fed. 639, (1889).
Houck v. Southern Pac. R. Co., 38 Fed. 226, (1888).

(42) Paxton Tie Co. v. Detroit So. R. Co., 10 I. C. C. Rep. 422, (**363**).
Cf. Daish v. Cleveland A. & C. R. Co., 9 I. C. C. Rep. 513, (**321**).
Palmers Dock Co. v. Penna. R. Co., 9 I. C. C. Rep. 61, (**293**).
Cox v. St. Louis & S. F. R. Co., 14 I. C. C. Rep. 464, (**708**).

(43) See Stone v. Detroit, G. H. & M. R. Co., 3 I. C. C. Rep. 613, 621, (**100-A**).

It would seem, from the decisions of the Commission, that a discrimination or preference, under either Section 2 or Section 3, may be created although the persons charged the different rates are not in competition with one another. There would appear to be better ground for holding, however, than in cases covered only by Section 3, the favoritism must be as between competitive shippers or commodities. Under this construction of the Act the Commission had no jurisdiction in certain of the cases cited in the preceding section.

131. Discriminations by a Carrier in Favor of Itself.

The question has also been raised in certain cases as to whether it is a violation of Sections 2 and 3 for a railroad to discriminate against certain shippers in favor of itself. In such cases care must be taken to distinguish between instances where the carrier transports articles for its own use as a carrier, and cases where it is itself a shipper and carries for itself as such.

Transportation by the carrier for itself of commodities for its use as carrier is not properly subject to the Act. Thus it may transport its own fuel coal without charge,[44] or may carry property for use in its station restaurants,[45] or may haul freight left on its hands to a convenient point at which to sell it,[46] or return its own property to manufacturers for exchange or repair,[47] without making any charge therefor.

132. Same Subject—Carriers Acting Also as Dealers in Commodities Transported.

Where, however, the carrier is also a shipper and a dealer in the commodities transported, either directly or through a corpora-

(44) Lehigh Val. R. Co. v. Rainey, 112 Fed. 487, (1902).
But cf. Admin. Rul. No. 9, (Nov. 18, 1907).
Cf. Chicago & A. R. Co. v. I. C. C., 000 Fed. 000, (**631**-B).
(reversing the Commission in Royal Coke Co. v. Southern R. Co., 13 I. C. C. Rep. 440, (**630**); and Traer v. Chicago & A. R. Co., 13 I. C. C. Rep. 451), (**631**-A).
But see, *contra*, U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 165 Fed. 113, (**495**-B); (reversing 154 Fed. 108, 118, 120), (**495**-A), (infra, §174).

(45) Admin. Rul. No. 87, (June 25, 1908).

(46) Tar. Circ. 15-A, Rule 78, (June 3, 1907).

(47) Admin. Rul. No. 22, (June 6, 1908).

tion controlled by it, any favoritism of itself in that capacity is clearly prohibited; as said by Chairman Cooley, this is the worst form of discrimination.[48] In several early cases, the Commission held that it was powerless to prevent a railroad which owned coal companies along its line, and charged them full transportation rates, from allowing such companies to sell their coal at such prices as to net a loss from mining, although this amounted to a discrimination and was obviously a mere device to allow such companies a less rate than that given other shippers. The Commission said that the only remedy for the independent operator in such cases was to secure him reasonable rates, the practice referred to being evidence that the rate charged was too high.[49]

A similar case came before the Supreme Court in which it was held that a railroad might not sell coal at a price less than the cost of mining and sale plus the published freight rate, but the decision was rested mainly on the provisions of Section 6.[50]

(48) Haddock v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 296, 316, (120), and cases cited.

Re Grain Rates of Chicago, G. W. R. Co., 7 I. C. C. Rep. 33, 38, (214).

In the case last cited Prouty, C., said:

"Granting that the Railway Company had the legal right under its charter to buy and sell this corn in this manner, still it must own it and transport it subject to the same limitations as every other individual. In its capacity of owner it was a private person, in its capacity of carrier it was a public servant. If it elected to become a private individual in respect of the ownership of this grain, it could extend to itself in its capacity as a public servant no other or different privileges than it extended to every other shipper. To hold that this respondent might become a shipper on its own account for the express purpose of avoiding the Act to Regulate Commerce would be to nullify that Act in many essential respects."

See also Re Alleged Unlawful Charges by L. & N. R. Co., 5 I. C. C. Rep. 466, 473, 476, (156-A).

McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 641, (289).

And cf. Wylie v. Northern Pac. R. Co., 11 I. C. C. Rep. 145, (388).

(49) Haddock v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 296, (120).

Coxe v. Lehigh Valley R. Co., 4 I. C. C. Rep. 535, 570, 573, 574, (124-A).

McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 641, (289).

See also Willson v. Rock Cr. R. Co., 7 I. C. C. Rep. 83, (219).

Re Grain Rates of Chicago, G. W. R. Co., 7 I. C. C. Rep. 33, (214).

(50) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361; 26 Sup. Ct. 272; 50 L. Ed. 515, (339-B).

See infra, §§247-248.

133. Same Subject—Confusion Between the Two Classes of Cases Above Mentioned.

In Southern Pac. Co. *v.* I. C. C.,[51] Mr. Justice Peckham intimated that where a rule of a railroad would operate to deny to shippers transportation facilities to which they were entitled, shippers would thereby be "subjected to undue, unjust and unreasonable prejudice and disadvantage, and the carriers given an undue and unreasonable preference and advantage" in violation of Section 3.[52]

If the above conception of the prohibition of Section 3 be adopted, then every unreasonable rate or charge would be an undue preference, merely because the carrier would unduly profit thereby. The above statement by Mr. Justice Peckham may perhaps have been made without full consideration of its significance.

134. Same Subject—How Far Carriers are Entitled to Consult Their Own Interest in Fixing Relative Rates Producing Discriminations.

There are many cases, of course, in which a rate or regulation adopted by a railroad to further its own ends, operates as an unjust discrimination between shippers or localities. Such a case is presented where a road maintains an unreasonable relation of rates in order to divert traffic over a branch of its road, giving it a long haul. This would seem to be proper to a certain extent.[53] but may not be carried too far.[54]

(51) 200 U. S. 536, 550-551; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302**-E).

(52) See also I. C. C. v. Southern Pac. Co., 123 Fed. 597, 601, (**302**-B).

(53) Little Rock & M. R. Co. v. East T., V. & G. R. Co., 3 I. C. C. Rep. 1, (**77**).

(54) Colorado Fuel, etc., Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 515-516, (**201**-A).

But see Savannah Bur. of Frt. v. Louisville & N. R. Co., 8 I. C. C. Rep. 377, 405, (**275**-A).

See also I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, (**275**-B).

Providence Coal Co. v. Providence & W. R. Co., 1 I. C. C. Rep. 107, 121, (**17**).

Re Joint Rail & Water Lines, 2 I. C. C. Rep. 645, (1889).

Newland v. Northern Pac. R. Co., 6 I. C. C. Rep. 131, (**179**).

Hill Cotton Co. v. Missouri, K. & T. R. Co., 6 I. C. C. Rep. 601, 618, (**210**).

In such cases, however, the fact that the rate in question operates to the advantage of the carrier, is not what makes it illegal, this fact being merely an attempted justification of the rate.

So, also, where a railroad places a very high rate on some commodity which it needs for its own use, such as railroad ties, for the purpose of keeping them on its own line, this circumstance may demonstrate the unreasonableness of the rate, or lead to a discrimination against outside localities or against shippers doing business off the line.[55] It would not, however, appear to produce a discrimination, within the meaning of the Act, in favor of the railroad and against the shipper.

In one case the Commission awarded damages against a railroad for refusing to haul ties off its own line,[56] but the reasoning on which this decision was based would not seem clear.

A railroad may properly prefer its own through traffic over its other freight to the extent of allowing special privileges to truckmen handling the through freight.[57]

The Commission has recently said that a carrier may properly offer lawful inducements to industries to locate on its own line.[58] The meaning of this statement is doubtful, for it has been held that reduced rates to classes who would build up the carrier's traffic are not justified,[59] nor are special rates to shippers located

Poor Grain Co. v. Chicago, B. & Q. R. Co., 12 I. C. C. Rep. 418, 426, (528).

And compare cases infra, §§171, 185-190.

Cardiff Coal Co. v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 460, 466, (632).

Cf. also California Com. Ass'n. v. Wells, Fargo & Co., 14 I. C. C. Rep. 422, (706).

Export Shipping Co. v. Wabash R. Co., 14 I. C. C. Rep. 437, (707).

(55) Reynolds v. Western N. Y. & P. R. Co., 1 I. C. C. Rep. 393, (35). Cf. Traer v. Chicago & A. R. Co., 13 I. C. C. Rep. 451, 456-7, (631-A).

(56) Paxton Tie Co. v. Detroit So. R. Co., 10 I. C. C. Rep. 422, (363).

(57) New York Team Owners' Ass'n. v. Southern Pac. R. Co., 12 I. C. C. Rep. 204, (497).

(58) Memphis Frt. Bur. v. Fort Sm. & W. R. Co., 13 I. C. C. Rep. 1, 4, (561).

(59) See supra, §71, and infra, §156.

on the carrier's own road.[60] A carrier may provide free entertainment along its line in order to stimulate traffic, provided such is not used as a mere device to prefer certain persons.[61]

135. Discriminations Between Competitive Commodities.

The prohibition of preferences and discriminations applies not only to discriminations in charges on the same commodity but also, especially Section 3, requires relatively reasonable rates on all competitive articles, although these differ to a considerable degree in consistency.[62]

(60) Hope Cotton Oil Co. v. Texas & Pac. R. Co., 12 I. C. C. Rep. 265, 268, (509).

Memphis Frt. Bur. v. Fort Sm. & W. R. Co., 13 I. C. C. Rep. 1, 4, (561).

(61) Tar. Circ. 15-A, Ruling No. 82, (July 8, 1907).

(62) Squire v. Michigan Cent. R. Co., 4 I. C. C. Rep. 611, 622, (126).

For example, the relation of rates between the following competitive commodities have been under investigation:

Live Hogs or Cattle and Their Products—

Squire v. Michigan Cent. R. Co., 4 I. C. C. Rep. 611, (126).

Chicago Bd. of Tr. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, (112).

Chicago Live St. Exch. v. Chicago G. W. R. Co., 10 I. C. C. Rep. 428, (364-A).

Shimmer v. Chicago, St. P., M. & O. R. Co., 14 I. C. C. Rep. 525, (1903).

I. C. C. v. Chicago & G. W. R. Co., 141 Fed. 1003, (364-B).

Finished and Unfinished Furniture—

Potter Mfg. Co. v. Chicago & G. T. R. Co., 5 I. C. C. Rep. 514, (160).

Box Shooks and Lumber—

Michigan Box Co. v. Flint & P. M. R. Co., 6 I. C. C. Rep. 335, (196).

Corn and Hominy—

Bates v. P. R. R., 3 I. C. C. Rep. 435, (89-A); 4 I. C. C. Rep. 281, (89-B).

Re Rates on Corn, 11 I. C. C. Rep. 212, 220, (394).

Grain and the Products Thereof—

McMorran v. Grand Tr. Ry. of Can., 3 I. C. C. Rep. 252, (86).

Bates v. Penna. R. Co., 3 I. C. C. Rep. 435, (89-A); 4 I. C. C. Rep. 281, (89-B).

Kauffman Co. v. Missouri Pac. R. Co., 4 I. C. C. Rep. 417, (121).

Milwaukee Ch. of Com. v. Chicago, M. & St. P. R. Co., 7 I. C. C. Rep. 481, (244).

Re Export & Dom. Rates, 8 I. C. C. Rep. 214, (265).

Listman Co. v. Chicago M. & St. P. R. Co., 8 I. C. C. Rep., 47, (257).

Kansas Bd. of R. Comrs. v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 304, (268).

Wichita v. Missouri Pac. R. Co., 10 I. C. C. Rep. 35, (**336**).

Re Rates on Corn, 11 I. C. C. Rep. 212, 220, (**394**).

Howard Mills Co. v. Missouri Pac. R. Co., 12 I. C. C. Rep. 258, (**508**).

Cotton Compressed and Uncompressed—

New Orleans Cot. Ex. v. Illinois Cent. R. Co., 3 I. C. C. Rep. 534, 571, (**96**).

Planters' Com. Co. v. Cleveland C. C. & St. L. R. Co., 11 I. C. C. Rep. 382, 606, (**402**).

Oil in Tanks and in Barrels—

Rice v. Louisville & N. R. Co., 1 I. C. C. Rep. 503, (**42**).

Scofield v. Lake Sh. & M. S. R. Co., 2 I. C. C. Rep. 90, 111, (**51**).

Re Relative Tank and Bbl. Rates on Oil, 2 I. C. C. Rep. 365, (**65**).

Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, (**111**).

Rice v. Cincinnati W. & B. R. Co., 5 I. C. C. Rep. 93, (**147**), (cases reviewed).

Indep. Ref. Ass'n. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 431, 440, (**155-A**).

Anthracite and Bituminous Coal—

Coxe Bros. v. Lehigh Val. R. Co., 4 I. C. C. Rep. 535, (**124-A**).

CHAPTER XII.

DISCRIMINATIONS AND PREFERENCES—DISCRIMINATION BETWEEN INDIVIDUALS DISTINGUISHED FROM PREFERENCES AMONG LOCALITIES.

136. Two Main Classes of Cases under Sections 2, 3 and 4.
137. Decisions Illustrating the Above Distinction—Wight v. U. S.
138. Same Subject—I. C. C. v. Alabama Midland R. Co.
139. Justice Shiras' Discussion of the Foregoing Decisions.
140 I. C. C. v. Detroit, Grand Haven & Milwaukee Ry. Co.
141. Discussion of Justice Shiras' Distinction—Importance of the Wight Decision.
142. Same Subject—Difference in Practical and Economic Problem Presented in the Alabama Midland Case.
143. Same Subject—Continued.
144. Same Subject—Result of the Alabama Midland Decision.
145. Same Subject — Further Difficulties Following from Justice Shiras' Distinction.
146. Same Subject—The Import Rate Decision Inconsistent with Justice Shiras' Distinction.
147. Deduction from the Cases.

136. Two Main Classes of Cases Under Sections 2, 3 and 4.

As noted in the previous chapter, the Supreme Court has held that certain considerations affect the legality of a preference among localities or of a greater charge for a shorter haul, which will not justify a discrimination among individuals, and that such a preference will not be "undue" under circumstances where, if the case were one between individuals, the discrimination would be "unjust." The phrase "under substantially similar circumstances and conditions" as used in Section 2 has been given a different meaning from that applied to it as used in Section 4. Under Section 3, also, different considerations have been held properly to influence a rate relation between competing localities from those accepted as justifying discriminations between individual shippers. The distinction between the cases is believed to rest, however, not on the Section under which the proceeding arises, but on whether the case is in its essence one involving a discrimination between individuals or is one presenting a preference of one lo-

cality over another;[1] it depends, not on the language of the Act, but on the practical difference in the economic problem presented in cases of discriminations among individuals from that involved in cases of preferences among localities.

137. Decisions Illustrating the Above Distinction—Wight v. U. S.

Two Supreme Court decisions bring out clearly the distinction referred to.

In Wight *v.* U. S.,[2] it was held that a railroad was not justified in transporting goods for a shipper who had a siding on the line of a competing road, at a rate less than its regular charge to others by the amount of the actual cost of hauling the freight from its depot to the warehouses, although this concession was necessary to prevent the freight from being shipped over the competing line. The Court held that although the phrase "under substantially similar circumstances and conditions" as used in Section 4, might have a broader meaning or a wider reach than the same phrase found in Section 2, yet as used in Section 2, it referred to the matter of carriage and did not include competition.[3]

138. Same Subject—I. C. C. v. Alabama Midland R. Co.

In I. C. C. *v.* Alabama Mid. R. Co.,[4] it was held that the railroad was justified in charging a less rate for a greater distance, al-

(1) It may be said that every preference of a locality is really nothing but a discrimination in favor of the individuals shipping to or from it. This is, of course, true, and different rates to different points are really, in a sense, a classification of the shippers at those points in respect to the rates charged them. Viewed in this light the distinction referred to above, and hereafter discussed, would merely be stated in another way,—that different circumstances may justify discriminations or preferences to individuals classed on the basis of the point to or from which they ship, from those which justify a discrimination among them classed in any other way, or in favor of a specific selected person.

(2) 167 U. S. 512; 42 L. Ed. 258; 17 Sup. Ct. 822, (223).

(3) See also Shamberg v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 630, 662, (127.)
Muskogee Com. Cl. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 312, 318, 319, (514).
Re Rates, Practices, etc., 13 I. C. C. Rep. 122, 123, (1908).
U. S. v. Atchison, T. & S. F. R. Co., 142 Fed. 176, 192, (406).
U. S. v. Milwaukee Ref. Tr. Co., 142 Fed. 247, 251, (411-A).

(4) 168 U. S. 144; 42 L. Ed. 414; 18 Sup. Ct. 45, (170-D).

though the only difference in the circumstances and conditions in the two hauls lay in the fact that at the more distant point there was competition with other carriers which made it necessary for defendant to allow the lower rate or lose the traffic.[5]

(5) For a discussion of this decision by the Commission, see 11th Ann. Rep. 37-46.

The authority of this case has never been questioned. It may be interesting, however, to examine the English legislation and decisions in force at the time of the passage of our Act, on which Sections 2, 3 and 4 were presumably based.

Section 2 of our Act was modelled on Section 90 of the English "Railway Clauses Consolidation Act" of 1845, (8 and 9 Vict. Cap. 20; III Boyle & Waghorn, pp. 148, 179), and Section 3 was modelled on the Second Section of the English Railway and Canal Traffic Act of 1854, (17 and 18 Vict. Cap. 31; III B. & W., p. 202), as modified by the Section 11 of the Act of 1873, (36 and 37 Vict. Cap. 48).

Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 222; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

The English Act, as it stood in 1887, contained no provision in any way corresponding to our Section 4.

Section 90 of the English Act of 1845, known as the "Equality Clause," after giving to the carriers power to vary their tolls so as to accommodate them to the traffic, (but without using such power to prejudice or favor particular parties or to create a monopoly) continued as follows:

"Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway *under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

Section 2 of the Act of 1854, after requiring the carriers to give reasonable facilities for receiving and forwarding traffic, provided:

"No such company shall make or give any *undue or unreasonable preference or advantage* to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue or unreasonable prejudice or disadvantage* in any respect whatsoever." . . . . .

The first provision applied only to discriminations between persons, and the crucial words were "under the same circumstances." The second provision forbad preferences in favor of persons and also of particular descriptions of traffic, wherever such preferences were "undue and unreasonable." When our Second and Fourth Sections were under debate

139. Justice Shiras' Discussion of the Foregoing Decisions.

In the Alabama Midland case, Justice Shiras discussed the Wight decision as follows:

"To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the Act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the

in Congress the phrase "under the same circumstances" was altered to the broader phrase "under substantially similar circumstances and conditions," so that our Act was presumably intended to cover preferences or discriminations which perhaps were not within the scope of the English legislation. Also our Act inserted the prohibition of undue preferences of localities and made "similar circumstances" the test of the legality of a greater charge for a less distance.

Under the Equality Clause, the English Courts had uniformly held that competitive traffic was carried under the "same circumstances" as non-competitive and that competition did not justify unequal rates between different shippers.

I Boyle & Waghorn, Chap. XVII.

See Denaby Main Co. v. Manchester S. & L. R. Co., 11 App. Cas. 97, (4 Ry. & Can. Tr. Cas. 23).

Under the Act of 1854 the decisions were not quite so clear. They are summarized, however, as follows, in I Boyle & Waghorn on the Law of Railway & Canal Traffic, p. 163:

"The decisions upon the defense of competition, as they stood in 1888, seem to be consistent to the effect that the necessities of competition afforded no sufficient answer in themselves to a complaint of undue preference, but that they would constitute a justifiable ground for a reduction of rates made with due regard to economy and bulk of traffic."

See Denaby Main Co. v. M. S. & L. R. Co., 11 App. Cas. 97; (4 Ry. & Can. Tr. Cas. 23, 28, 438).

Section 27 of the English Act of 1888 (51 and 52 Vict. Cap. 25; III B. & W. 271, 283), however, altered the law very materially in this particular. Sub-section 1 provided that in all cases where unequal charges or treatment appeared, the burden of justifying such difference was on the carrier. Sub-section 2 empowered the Court or Commission, in deciding whether the preference was undue, to take into consideration whether the lower charge or difference in treatment was necessary to secure the public interest, and whether the inequality could not be removed without unduly reducing the rate charged complainant, and provided that no difference in the rates on or treatment of home or foreign merchandise be sanctioned in respect of the same or similar services. Finally, sub-section 3 gave the Commission or Court power to direct that

aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the Act.

"As we have shown in the recent case of Wight *v.* United States, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor;

no higher charge be made for the less distance for similar services on like traffic on the same line.

This latter Act left the whole question to the unfettered discretion of the Commission, (I Boyle & Waghorn, p. 169). Under it they were clearly entitled to take into consideration the effect of competition or any other circumstances which they deemed relevant, and it has been so held by the English Courts in cases arising since 1888.

See Phipps v. London & N. W. R. Co., (1892), 2 Q. B. 229.

Liverpool Corn Traders' Asso. v. Great W. R. Co., 1893, 8 Ry. & Can. Tr. Cas. 114.

The latter statute, however, is entirely foreign to the present question, for the interpretation of our Act can only be affected by statutes and decisions in effect at the time of its passage, such being presumably incorporated into our statute. (I. C. C. v. Baltimore & O. R. Co., 145 U. S. 263, 284; 12 Sup. Ct. 844; 36 L. Ed. 699), (91-C). The Phipps case, cited by the Supreme Court in the Alabama Midland decision, can hardly be said to support the position taken by the Court.

Viewed, therefore, in the light of the English legislation in force in 1887, it would seem that, although perhaps competition might have been held to render a preference not "undue" under Section 3, this could not render the circumstances and conditions substantially dissimilar under Section 4. In a case like the Import Rate Case (infra, §146), where Section 4 was not applicable and which involved really a preference between localities as distinguished from a discrimination between individuals, it might well be held that competition was a proper matter to be considered. But in cases arising under our Sec. 4, the conclusion might appear reasonable, that in using the language of the Equality Clause instead of that of the Undue Preference Clause, Congress intended to adopt the construction put by the English Courts on the former Act and to exclude competition as a factor in long and short haul cases.

As a practical matter, however, transportation conditions in England are so radically different from those in the United States, and our

and we there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

"This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the Act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates."

140. I. C. C. v. Detroit Grand Haven and Milwaukee Ry. Co.

With these two decisions it is instructive to compare a third, I. C. C. *v.* Detroit, Grand Haven & Milwaukee R. Co.,[6] decided on the same day as the Wight case. It was there held that defendant did not violate Sections 4 and 6 of the Act by charging to Ionia merchants the same rate charged to those at Grand Rapids, 34 miles more distant on the same line, although the services to the latter point included free cartage, while the rate to Ionia did not. The cartage allowed at Grand Rapids was not specified in the published tariffs. It consisted in a haul of the freight at a cost of two cents per 100 pounds for 1½ miles from defendant's depot to the business center of the town, where depots of competing lines were situated. The Circuit Court had relied on Section 2 as rendering the practice complained of illegal, but in the Supreme

general policy of railroad development and management is so vitally at variance with that adopted by Parliament, that from an economic point of view English laws and decisions should have scarcely any weight in determining American questions.

The decision in the Alabama Midland Case was in accordance with the theories of railroad management which have prevailed in the United States. To have supported the Commission's contention would have thrown a great part of our vast railway system into utter confusion, and would have made impossible much of our long distance traffic, to the inevitable detriment of our commerce and development.

(6) 167 U. S. 633; 42 L. Ed. 306; 17 Sup. Ct. 986, (100-D).

Court, counsel for the Commission placed his entire reliance on Sections 4 and 6, and in view of this fact, the Court did not pass on the applicability of Section 2 to the case under discussion.[7]

141. Discussion of Justice Shiras' Distinction—Importance of the Wight Decision.

Prior to the passage of the Act, one of the circumstances which made possible the growth of the Trusts, was the fact that the fierce competition of the different railroads for the traffic of the principal shippers had led to the allowance to them of special rates. These shippers, realizing that their business was so large that the railroads could afford and were ready to give them lower rates to secure it all, refused to ship by any line not allowing them concessions. It was this very practice which the Act, particularly Section 2, was designed to stop. These special rates to large shippers were only in rare instances voluntary concessions on the part of the railroads; the latter have always been willing and anxious that some means be devised by which rebates might be abolished. The condition was clearly the result of competition among the different roads. If, therefore, in the Wight case it had been held that the defendant had been justified in paying the cartage charges in order to secure from the competing road the traffic of shippers situated on the line of the latter, the whole purpose of Section 2 would have been defeated. All that the carrier would be required to show would be that unless the special rate had been allowed, the favored shipper would have sent his freight by some other line, while such was not the case with regard to those shippers which had been charged the higher rate.

142. Same Subject—Difference in the Practical and Economic Problem Presented in the Alabama Midland Case.

Wight *v.* U. S. was the first case presented to the Supreme Court which involved a discrimination between individuals based on competition. Prior to this time, in a number of cases the Circuit Courts had decided, and the Supreme Court had intimated its ap-

(7) It is interesting to note that in a case where the legality of the practice under Section 2 was presented on the record, the Court seemed to have felt itself at liberty to ignore that Section because counsel saw fit to do so.

Cf. I. C. C. v. Southern Pac. R. Co., 132 Fed. 829, 837, (302-C).

proval of the point subsequently decided in the Alabama Midland case, that competition of rival lines at the greater distant point created a dissimilarity of circumstances and conditions which justified the carrier in making an exception to the rule of Section 4, without prior application to the Commission for relief.

The Supreme Court recognized that competition among rival carriers was, in general, beneficial to shippers and to the public, and that the Act, far from being intended to stifle such competition, was in many respects designed to promote it. In view of the history and purpose of the Act, it was therefore so to be interpreted so as to permit as far as possible the operation of competition, and so to be construed as to check such competition only where its free operation would defeat the manifest object of the statute. Such would clearly result if competition were held to justify a discrimination between individual shippers; but where the question arose not between individuals as such, but between shippers at different localities, the practical question involved was a very different one. The railroads could, without injury to themselves, be required to treat all individuals, large and small, alike, and in spite of competition, refrain from secret or open discrimination. They themselves were the first to welcome an era of freedom from rebates. Competition for individual traffic benefited only the large and powerful shipper, to the detriment of the small.

Where, however, a line ran through a small town to a large competitive trade centre beyond, and the rate to the intermediate point was itself reasonable, the practical result of refusing to allow such line to charge a less rate to the more distant point to meet the rates of competing lines, would be very serious. Unless the competing roads came to some understanding to maintain higher rates at the competitive point, in violation of Section 5 and of the Sherman Anti-Trust Act, the carrier would be required either to abandon the long haul traffic, or else to reduce all its local rates to such an extent as ultimately to force it into bankruptcy.

143. Same Subject—Continued.

It is a familiar fact, in reference to railroad rates, that rates for long hauls to highly competitive points do not contribute their proportionate share toward the net income of the road. The return from such traffic, although greater than the cost of service

of transportation apart from the payment of fixed charges, is such that if all charges were put on this basis, the road would eventually be forced into insolvency. But with a road already built and organized for local and non-competitive business, the small margin of profit over operating expenses on competitive traffic helps to meet interest on fixed charges, even though not contributing its full proportionate share toward them, and so benefits the stockholders of the road as well as giving the public generally the benefit of the low competitive rate to the distant point. The individual shipper who receives a special rate pockets the whole profit himself, and small competitors and the public reap no benefit therefrom. In the case of low rates to competitive points, however, such rates ultimately inure to the advantage of the entire surrounding country. Merchants at outlying points need never pay more than a reasonable local charge in addition to the low competitive rate, while if the latter were not in force, the total rate charged the non-competitive point might be considerably higher.

144. Same Subject—Result of the Alabama Midland Decision.

It is undoubtedly true that none of the foregoing considerations are specifically expressed in the language of the Act to Regulate Commerce, and that many of them will not be found in the opinions of the Supreme Court, but one may be permitted to infer that the Supreme Court had them in mind when it placed a different interpretation on the words "under substantially similar circumstances and conditions" as used in Section 2 from that given the identical words as used in Section 4. It is also true that one of the main purposes of the Act was to prevent the preference of large trade centres over the smaller and weaker surrounding points by the use of the basing point system of rates, and that to permit competition as a justification of the greater charge for the shorter distance tends to defeat this purpose. But the Supreme Court, realizing, as Senator Cullom had done when his committee drafted the Act, that it was in the nature of an experiment [8] and especially so as to the fourth section, and recognizing that to prevent the operation of competition of carriers at large points was

(8) See Cullom Report, p. 197.

Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 218, 219; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

really to the disadvantage of railroads, shippers, and public alike, and that to require absolute equality of treatment for large and small communities was contrary to all the laws of evolution and to the history of railroad management, established the rule that although the competition of carriers did not justify a discrimination between individuals, yet a preference of one locality over another, caused by competition, was not undue.

145. Same Subject—Further Difficulties Following from Justice Shiras' Distinction.

Justice Shiras' distinction of the two cases is that Section 2 is applicable only where the two shippers "shipping over the *same* line, *the same distance,* under the *same* circumstances of carriage, are compelled to pay different prices therefor," "thus leaving no room for the operation of competition," while "in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation," among which facts is competition.

But the answer to this distinction would seem to be that, in the Wight case, competition did *in fact* operate to cause the discrimination. Further, the language of Section 2 does not restrict its application to shipments over the *same* line exactly the *same* distance or under the *same* circumstances, but applies to cases of *like* services in transporting *like* traffic under *substantially similar* circumstances and conditions. To bring a case within the language of this section identity of service is not required; substantial similarity only is necessary.[9]

The rule restricting Section 2 to cases of identical service would, of course, distinguish the Detroit and Grand Haven case from Wight *v.* U. S., as regards the application of Section 2 to the facts there presented, for the distance by rail to Ionia was not the same as to Grand Rapids. But it is submitted that such is not the true distinction, which lies in the fact that the Wight case was one involving a difference in the rates charged individuals, while the Detroit and Grand Haven case presented a preference between different localities. To adopt Justice Shiras' distinction would make it illegal for a road to furnish free cartage to or from a point some miles off its own line, and served by competing

(9) See U. S. v. Vacuum Oil Company, 153 Fed. 598, 607, (468).

roads;[10] it would also make it legal for a railroad to make a less charge to a large individual shipper situated on a competing line, provided it built a spur track out to his plant and made a depot and station there. The first of these cases would be in its essence the same as the Detroit and Grand Haven or Alabama Midland cases, and the latter the same as the Wight case. Also Justice Shiras' distinction would seem to make competition a justification for discrimination among individuals in respect to facilities other than rates proper, covered only by Section 3. There can be no possible reason why competition should justify a discrimination in car-distribution, and not one in rates.

146. Same Subject—The Import Rate Decision Inconsistent with Justice Shiras' Distinction.

On Justice Shiras' theory it would also seem difficult to reconcile the Import Rate Case.[11] In this case it was held that a railroad might legally charge a lower inland rate on freight which had come from foreign ports, than on freight originating at the port of entry, where forced to do so by the competition of steamship lines and of other railroads receiving traffic through other ports. In this case all the circumstances of carriage were practically the same in respect to the foreign and domestic traffic. The cost of the service to the carrier was virtually the same in both cases; the freight itself was the same; the distance the same over the same line; and the only difference in conditions was the external fact that the foreign freight originated at a competitive point.[12]

(10) This would have been the Grand Haven case if the complaint had been brought not by Ionia merchants but by shippers at the Grand Haven station who did not need the free cartage service.

(11) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

(12) It is true that the foreign freight under consideration in that case was shipped from the foreign ports to its final destination in the United States under through bills of lading (162 U. S. p. 210), but not at joint through rates with the steamship lines. The railroad import rate was merely a proportional rate applicable to traffic coming from a connecting carrier not subject to the Act, with whom the railroad could not make and file a joint tariff (see Cosmopolitan Shipping Co. v. Hamburg Packet Co., 13 I. C. C. Rep. 266, 279-281), (608). The decision has always been accepted as controlling export cases where there is no relation at all between the railroad and the steamship line, and where

147. Deduction from the Cases.

Undoubtedly, it may be difficult in some cases to determine whether or not the advantage is given to an individual as such, or as a shipper from a given locality. Such a difficulty might arise where, for instance, there is but one shipper at a certain point. In every case, however, the Court must look to the substance of the matter and not accept the facts merely as they appear on the surface. Where a special rate to or from a given locality is really designed for the use of a single shipper,[13] the case should be treated as one of discrimination among individuals.

It is submitted that the proper distinction between the cases lies not in the identity of the service, but in the nature of the advantage given, and that the test is whether the favored shipper has been given this advantage as an individual selected from other similar shippers, or whether he has received it merely as one of a class shipping from a favored locality. If the former, it is not justified by competition, if the latter, it is. Discrimination between individuals or classes of individuals must be based exclusively on difference in cost of service, while rates between different localities may vary with the value of the service to the shipper, and depend to a considerable extent on what rate the traffic will bear.

the shipper's agent arranges for the ocean carriage entirely independently of the railroad, while the freight is in transit by rail or even after its arrival at the port.

Re Export & Domestic Rates, 8 I. C. C. Rep. 214, 255, (**265**).

Pittsburg Co. v. Pittsburg C. C. & St. L. R. Co., 13 I. C. C. Rep. 87, 100, (**578**).

The essential feature of the Import Rate case was the fact that competition made the lower import rate necessary. The case being one of a preference between shipping points, the foreign shipper against the domestic one, and not of one particular shipper against another, this competition was allowed to have its normal economic effect.

See further as to this case, infra, §187.

(13) See Atchison City Councils v. Missouri Pac. R. Co., 12 I. C. C. Rep. 111, (**477**).

And U. S. v. Vacuum Oil Co., 153 Fed. 598, 607, (**468**).

Cases like these should be distinguished from those in which a far-sighted shipper places his plant at points which will naturally get low rates, such as Rice v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 228, (**115**).

Compare also Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 140-1, (**111**).

Clark Co. v. Lake S. & M. S. R. Co., 11 I. C. C. Rep. 558, 578, (**420**).

CHAPTER XIII.

DISCRIMINATIONS AND PREFERENCES—DISCRIMINATIONS BETWEEN INDIVIDUALS BY DIRECT DIFFERENCES IN CHARGES.

148. Cost of Service the Test of Justice of Discriminations Between Individuals.

149. Same Subject — Qualifications of Above Rule—Rates Based on Amount of Shipment.

150. Same Subject—Distinction Between Amount of Annual Traffic and Amount of Particular Shipments.

151. Same Subject — Further Qualifications—Protection of Small Shippers.

152. Same Subject — Carload Rates to Forwarding Agents — Lundquist v. Grand Trunk Western R. Co.

153. Same Subject—U. S. v. Chicago & Northwestern R. Co.

154. Same Subject—The Opinion of the Commission in Re Party Rates.

155. Same Subject — Difference in Cost of Service no Justification where such Difference may be Obviated by the Carrier.

156. Instances of Rate Discriminations between Individuals.

157. Passes and Reduced Rates —Rules of Construction Applicable to Sections 1 and 22.

158. Same Subject—Cases under Section 22.

159. Same Subject—Who may Lawfully Receive Free Passes.

148. Cost of Service the Test of Justice of Discriminations Between Individuals.

As shown in the previous chapter, discriminations among individuals or classes of individuals, as distinguished from preferences among localities, may properly be based solely on differences in cost of carriage or service.

149. Same Subject—Qualifications of Above Rule—Rates Based on Amount of Shipment.

In this connection one of the most important questions to be considered is to what extent a difference in rates may properly be based on the amount of the shipment. How far may the Wholesale Principle influence railroad rates?[1]

(1) See also supra, §§66-68, as to how far rates may be based on the volume of the traffic and the amount of the shipment.

It is usually cheaper per 100 pounds to carry a large quantity of freight than a small quantity, but the fact that the Act was passed largely to protect the weak from the strong has influenced the Commission toward minimizing the influence of the wholesale idea as applied to freight rates.[2] In two particulars the wholesale principle has always been given full effect. The Commission from the outset has held that long distance shipments may and should properly be less per ton per mile than shorter ones, and that rates for carload shipments may properly be made less per 100 pounds than on shipments in less than carloads.[3]

Party or passenger carload rates, lower than the rates for single passengers, were originally condemned by the Commission as illegal,[4] but this ruling was reversed by the Supreme Court.[5] The Circuit Courts have several times expressed the opinion, in subsequent cases, that it followed from the latter decision that the

(2) The Commission has always put itself on the side of the weak against the strong. See supra, §§66-68 and infra §290.

(3) Thurber v. New York C. & H. R. R. Co., 3 I. C. C. Rep. 473, (92).

Harvard Co. v. Penna. Co., 4 I. C. C. Rep. 212, 223, (114).

The difference in the carload and less-than-carload rate may be so great, however, as to amount to an unreasonable discrimination against the small shipper.

Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 109, (173).

Business Men's League v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 318, 356-357, (311).

See also Scofield v. Lake S. & M. S. R. Co., 2 I. C. C. Rep. 90, 109, (51).

Barrow v. Yazoo & M. V. R. Co., 10 I. C. C. Rep. 333, (353).

Masurite Co. v. Pittsburg & L. E. R. Co., 13 I. C. C. Rep. 405, 408, (626).

(4) Re Passenger Tariffs, 2 I. C. C. Rep. 649, (1889).

Pittsburg C. & St. L. R. Co. v. Baltimore & O. R. Co., 3 I. C. C. Rep. 465, (91-A).

See also Foster v. Cleveland C. C. & St. L. R. Co., 56 Fed. 434, (1893).

(5) I. C. C. v. Baltimore & O. R. Co., 43 Fed. 37, (91-B); 145 U. S. 263; 36 L. Ed. 699; 12 Sup. Ct. 844, (91-C).

The courts have never specifically approved passenger carload rates, but the reasoning in the Party Rate case is believed to control this question.

wholesale principle applied to freight rates.[6] This statement, however, is not believed to be correct. Where it clearly appeared that the actual cost of transporting freight in large shipments was less than in small ones, the Courts would probably sustain a difference in rates not exceeding the difference in cost,[7] but it is not believed that a difference in rates based on the size of annual shipments would be upheld.[8] The mere fact that, on general business principles, the carrier would rather earn two cents per 100 pounds on 10,000 tons than three cents on 100 tons would not be regarded as a justification for a concession of one cent to all shippers who furnished 10,000 pounds of freight a year.

150. Same Subject—Distinction Between Amount of Annual Traffic and Amount of Particular Shipments.

The difference in the actual cost of carriage is affected only to a slight degree by the amount of the shipper's annual traffic, and the real cause of the lower rate to the larger shipper in these cases is the competition of other roads for his freight, which under the Wight case,[9] is not a circumstance which will justify a discrimination. This distinction is brought out in the case of Hays *v.* Penna. Co.,[10] decided prior to the passage of the Act, in which it was held that the amount of a shipper's annual freight did not justify a special rate in his favor, although it was intimated that a difference in rates might be based on the quantity of single shipments.

(6) I. C. C. v. Detroit G. H. & M. R. Co., 57 Fed. 1005, 1011, (**100**-B).
I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1015, (**364**-B).

(7) The Commission in one case refused to sanction cargo rates less than the regular rates per carload (Paine Bros. v. Lehigh Valley R. Co., 7 I. C. C. Rep. 218), (**228**).
But it is not believed that this case can be taken as laying down a general rule to be applied in all cases. See New Orleans Live St. Ex. v. Texas & Pac. R. Co., 10 I. C. C. Rep. 327, 331, (**352**).

(8) It has been so held by the Commission in several cases:
Providence Coal Co. v. Providence & W. R. Co., 1 I. C. C. Rep. 107, (**17**).
Harvard Co. v. Penna. Co., 4 I. C. C. Rep. 212, (**114**).
See also Carr v. Northern Pac. R. Co., 9 I. C. C. Rep. 1, 14, (**290**).
See also California Com. As. v. Wells, Fargo & Co., 14 I. C. C. Rep. 422, 432-3, (**706**).

(9) Supra, §137.

(10) 12 Fed. 309, (**9**).

In other cases decided prior to the Act it was held that although a reasonable difference in rates based on the amount of annual shipments might be justified, in these cases the differences in rates were unreasonable.[11]

Undoubtedly it would be more economical for the carrier to be able to deal only with large shippers, but one of the principal purposes of the Act was to prevent this result from the free operation of competition among railroads to secure the traffic of large shippers. It was this competition which caused them to give special low rates to the powerful shippers, which would in turn enable the latter to do all the business and thus crush their weaker competitors.[12]

151. Same Subject—Further Qualifications—Protection of Small Shippers.

In several other cases,—discussed in a prior chapter [13]—the Commission has seemingly refused to accept cost of service as a sufficient justification for discriminating rates. It is believed that such cases, on examination, will be found for the most part to be instances where the party favored was a large and powerful shipper. For example, in the numerous cases decided by the Commission during the first few years after its organization involving relative tank and barrel rates on oil, it clearly appeared that the tank method, used practically exclusively by the Standard Oil Company, was much cheaper to the railroad, but in its eagerness

(11) Burlington C. R. & N. R. Co. v. Northwestern F. Co., 31 Fed. 652, (1887).

Menacho v. Ward, 27 Fed. 529, (1886).

See also U. S. v. Tozer, 39 Fed. 369, 371-2, (70-B).

Kinsley v. Buffalo, N. Y. & P. R. Co., 37 Fed. 181, (1888).

(12) See Glade Coal Co. v. Baltimore & O. R. Co., 10 I. C. C. Rep. 226, 243-4, (347).

See, however, p. 253 of same case.

See also I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1019, (364-B), where it was said that the product in question being concentrated in the hands of a few large shippers rendered the competition stronger and influenced the rate. The latter case was not, however, one involving a discrimination in rates in favor of large shippers.

(13) See supra, §63.

to protect the small shipper against the Trust the Commission practically disregarded this feature of the case.[14]

152. Same Subject—Carload Rates to Forwarding Agents—Lundquist v. Grand Trunk Western R. Co.

In two recent Circuit Court decisions the Courts would also seem to have departed to a certain extent from the test of the Cost of Service in cases of discrimination among individuals.

In Lundquist *v.* Grand T. W. R. Co.,[15] Judge Kohlsaat held that the defendant railroad was justified in refusing to allow complainants, forwarding agents, carload rates on combined less-than-carload lots of merchandise belonging to various parties, collected into carload lots and so shipped by complainants. Judge Kohlsaat relied to a certain extent on the defendant's liability to several suits on the part of the real owners of the goods, as throwing on the carrier a greater burden than where one shipper owned the entire carload, but this increased risk was not, of course, serious enough to make up the difference between the carload and less-than-carload rate. The case, it would seem, must be regarded as one in which a discrimination against an individual was held to be justified by a circumstance other than a difference in the conditions of carriage or cost of service. Judge Kohlsaat himself would seem to have recognized that his decision was not strictly in accordance with the principle of the Wight case,[16] when, on page 918 of his opinion, he said:

"The trend of the American decisions and the official utterances of the Interstate Commerce Commission all recognize the

(14) See Rice v. Louisville & N. R. Co., 1 I. C. C. Rep. 503, (**42**).
Scofield v. Lake S. & M. S. R. Co., 2 I. C. C. Rep. 90, 111, (**51**).
Re Relative Tank and Barrel Rates on Oil, 2 I. C. C. Rep. 365, (**65**).
Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, (**111**).
Rice v. Cincinnati, W. & B. R. Co., 5 I. C. C. Rep. 193, (**147**).
Independent Ref. As. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, (**155** A).
The latter decision was taken up to the Supreme Court, which recognized the difference in cost of service as justifying a greater charge in barrel shipments and refused to enforce the order of the Commission.
Western N. Y. & P. R. Co. v. Penn. Ref. Co., 137 Fed. 343, (**155**-E); 208 U. S. 208; 28 Sup. Ct. 268; 52 L. Ed. 493, (**155**-F).

(15) 121 Fed. 915, (**294**).

(16) Supra, §137.

principle that the particular facts of each case must have great weight in the application of the provisions of the Interstate Commerce Act."

This case illustrates forcibly what has heretofore been said, that the decisions under this Act cannot all be reconciled on any strictly logical basis, but that practical and economic considerations enter into their determination to a much greater degree than in case of most other branches of the law. The consideration which evidently influenced this decision most strongly was that if the railroads were required to allow carload rates to these forwarding agents, who were virtually freight scalpers, it would open up the way for the agents, by dividing their profits with certain shippers, to have less-than-carload freight shipped for different shippers at different rates, in violation of the spirit and purpose of the Act. Also, it would seem unfair to the carrier, which has arranged its traffic so that from its combined carload and less-than-carload revenue it may have a reasonable return on its capital invested, to have its less-than-carload rates reduced to carload figures. It is also significant that this case was not the usual one of favoritism toward a particular individual, but of alleged discrimination against one not himself a shipper, and whose occupation was looked on with disfavor by both the railroads and the courts, as tending to defeat the equality of rates among shippers prescribed by the Act.[17]

In two recent cases the Commission has refused to follow the Lundquist decision, holding that a regulation of the carriers under which carload or bulk shipment rates were denied to forwarding agents was unreasonable and discriminatory.[18] The Chairman

(17) See California Com. As. v. Wells Fargo & Co., 14 I. C. C. Rep. 422, 435, (706).

Cf. Ottinger v. Southern Pac. R. Co., 1 I. C. C. Rep. 144, (20).

Thompson v. Penna. R. Co., 10 I. C. C. Rep. 640, 645, (373).

See also Buckeye Buggy Co. v. Cleveland C. C. & S. L. R. Co., 9 I. C. C. Rep. 620, 625, 631, (328).

Bell v. Baltimore & O. S. W. R. Co., 9 I. C. C. Rep. 632, (1903).

Great Western R. Co. v. Sutton, L. R., 4 H. of L. 226.

I Boyle & Waghorn on the English Railway and Canal Traffic Acts, pp. 160-161.

(18) California Com. As. v. Wells Fargo & Co., 14 I. C. C. Rep. 422, (706).

Export Shipping Co. v. Wabash R. Co., 14 I. C. C. Rep. 437 (707).

and Commissioner Harlan dissented from the decision of the majority in both these cases. From the opinions it would seem that the majority considered that the existence of the forwarding agent helped the small shipper against his larger competitor, while the dissenting Commissioners believed that to sanction his occupation would hurt merchants at small outlying points, which could not afford a forwarding agent, as against those at the large commercial centres. This whole question will doubtless be settled shortly by the Supreme Court. Viewed from a legal standpoint, the decision of the Commission would appear to be the logical one.[19]

153. Same Subject—U. S. v. Chicago, and Northwestern R. Co.

The other decision referred to is U. S. *v.* Chicago & N. W. R. Co.[20] It was there held that the Government was not entitled to the benefit of the ten-party rates accorded by the defendant to athletic teams, theatre and concert troupes and similar organizations. The Court, in its opinion, relied on a number of circumstances of dissimilarity between the transportation of Government troops and of the organizations allowed the party rates, most of which involved differences in the cost of service, but some of which apparently did not. Thus, in addition to the fact that the Government's tickets were unlimited in time while those to amusement companies were limited, and to the fact that the Government did not pay in advance, while the others did, the Court relied on the fact that amusement companies usually furnished return traffic and also that they stimulated the travel of other passengers. Neither of these two latter considerations relate to the immediate cost of carriage; the first has been mentioned by the Commission as a proper consideration in respect to freight rates, but the Commission has always held that the fact that the transportation of a certain class of passengers will tend to stimulate

(19) See also Johnson v. Dominion Exp. Co., 28 Ont. Rep. 203, (1890).
Chambers v. Penna. R. Co., 4 Brewst. (Pa.) 563.
Crouch v. London & N. W. R. Co., 14 C. B. 255, (1854).
Baxendale v. Southwestern R. Co., 35 L. J. Exch. 103, (1866).

(20) 127 Fed. 785; 62 C. C. A. 465, (332).

other traffic is not a sufficient justification for a discrimination in their favor.[21]

154. Same Subject—The Opinion of the Commission in Re Party Rates.

The case of U. S. *v.* Chicago & N. W. R. Co. was discussed by the Commission in Re Party Rate Tickets,[22] and it was pointed out that the decision in that case might well have been rested on the difference in cost of carriage. The Commission refused to follow what it termed the dicta of the Court with regard to the stimulation of incidental traffic being a justification for special rates, holding that railroads issuing party-rate tickets might not limit them to particular classes of persons, such as amusement companies, but that they must be open to the whole public alike, unless the discrimination was based on a difference in the cost of service.[23]

In the Party Rate case, the Commission issued no order, and if in a subsequent case it appeared that it was necessary, in order to prevent scalping, to limit party-rate tickets to persons in some way connected with one another, and which could be recognized as a unit, it is very probable that this would be allowed by the Commission, and, in view of the decision in the Lundquist case, by the Circuit Courts also.[24]

155. Same Subject—Difference in Cost of Service No Justification Where Such Difference May be Obviated by the Carrier.

The Commission has said that a railroad cannot justify a discrimination on the ground of difference in cost of service where

(21) Larrison v. Chicago & G. T. R. Co., 1 I. C. C. Rep. 147, (21).
Smith v. Northern Pac. R. Co., 1 I. C. C. Rep. 208, (28).
Elvey v. Illinois Cent. R. Co., 3 I. C. C. Rep. 652, 656, (101).
See also supra, §71, and infra, §156.

(22) 12 I. C. C. Rep. 95, (474).
Affirmed and damages awarded in Koch Co. v. Louisville & N. R. Co., 13 I. C. C. Rep. 523, (638).

(23) Such was the case in Carr v. Northern Pac. R. Co., 9 I. C. C. Rep. 1, (290).
See also Field v. Southern R. Co., 13 I. C. C. Rep. 298, (613).

(24) As to the tendency of the Federal Courts to interpret the Act so as to prevent the possibility of different rates being charged to different shippers or passengers, whether directly or through the intervention of scalpers, see supra, §126.

by adopting a different kind of equipment this difference could be obviated.[25]

156. Instances of Rate Discriminations Between Individuals.

The Commission has held that immigrants may be given special passenger rates, where the accommodations to them are inferior,[26] but that they may not be given low freight rates, the service being the same, merely because their settlement along the road will tend to bring additional traffic.[27]

The social or political position of a traveler is not a valid ground for a special rate in his favor.[28]

A rate on coal for "railroad supply" lower than on coal for manufacturing or other purposes is an unjust discrimination.[29]

A special coal rate to a class of persons called "Manufacturers" has been held illegal.[30]

Although perhaps in times of congestion preference may be given to needed fuel for other carriers, such carriers may not be allowed preferential rates.[31]

A railroad may not discriminate in favor of its "regular patrons" as against "occasional shippers."[32] In one case, how-

(25) Chicago Bd. of Tr. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, 187, (112).

The correctness of this proposition, as an invariable rule, would perhaps seem open to some doubt. It would seem to depend on how practicable it was for the carrier to provide the new equipment.

(26) Savery v. New York Cent. R. Co., 2 I. C. C. Rep. 338, 358, (63).

(27) Elvey v. Illinois Cent. R. Co., 3 I. C. C. Rep. 652, 656, (101).
Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 100, 102, (173).
See also supra, §§71, 153, and 156.

(28) Harvey v. Louisville & N. R. Co., 5 I. C. C. Rep. 153, (144).
Re Carriage of Persons Free, etc., 5 I. C. C. Rep. 69, 78, (1891).
Re Charge to Grand Jury, 66 Fed. 146, (1895).

(29) Capital City Gas Co. v. Central R. of Vt., 11 I. C. C. Rep. 104, (385).
Administrative Ruling No. 34, (Feb. 3rd, 1903).

(30) Re Alleged Unlawful Rates by Louisville & N. R. Co., 5 I. C. C. Rep. 466, (156-A).

(31) Tar. Circ. 15-A, Rul. No. 73, (May 6th, 1907).

(32) Riddle, Dean & Co. v. New York, L. E. & W. R. Co., 1 I. C. C. Rep. 594, 603, (43).

ever, it was intimated that a free parcel express service to patrons of a railroad was proper, if published.[33] This would really be included in the price of the commutation tickets, the possession of which would define the favored class.

Although in times of congestion a railroad may, it would seem, place an embargo on particular commodities, not competitive with articles excepted from the embargo, it cannot at such a time properly embargo the shipments of a particular shipper.[34]

Drummers may not be given special rates;[35] nor may land explorers or settlers, though they stimulate the traffic of the carrier.[36]

A carrier may not properly allow reduced rates to persons who buy tickets covering meals and hotel accommodations on a personally conducted tour.[37]

It is not proper to charge different excursion fares to different societies,[38] or to limit the use of Pullman cars at stop-over points to members of a particular club.[39]

It is not an unjust discrimination to make one class of tickets transferable and another not, where either kind may be purchased by all applicants;[40] nor to charge passengers 25 cents extra where they pay their fares on the train;[41] nor to refuse to redeem passenger tickets after the expiration of the time limit specified therein;[42] nor to decline to refund excess fare to a commuter who forgets his ticket.[42]

(33) Walker v. Baltimore & O. R. Co., 12 I. C. C. Rep. 196, (**494**).

(34) Rogers v. Philadelphia & R. R. Co., 12 I. C. C. Rep. 308, 310, (**513**).

(35) Larrison v. Chicago & G. T. R. Co., 1 I. C. C. Rep. 147, (**21**).
See also Admin. Rul. No. 45, holding that a carrier may not confine the right to ride on freight trains to drummers or commercial travelers.

(36) Smith v. Northern Pac. R. Co., 1 I. C. C. Rep. 208, (**28**).
Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 100, 102, (**173**).
See also Slater v. Northern Pac. R. Co., 2 I. C. C. Rep. 359, (**64**).
Also supra, §§71, 153, and 156.

(37) Administrative Ruling No. 28, (Jan. 13, 1908).
Cf. Wylie v. Northern Pac. R. Co., 11 I. C. C. Rep. 145, (**388**).

(38) Admin. Rul. No. 71, (May 5th, 1908).

(39) Admin. Rul. No. 51, (March 11th, 1908).

(40) Ottinger v. Southern Pac. R. Co., 1 I. C. C. Rep. 144, (**20**).

(41) Sidman v. Richmond & D. R. Co., 3 I. C. C. Rep. 512, (**94**).
Cist v. Michigan Cent. R. Co., 10 I. C. C. Rep. 217, 219, (**345**).

(42) Sidman v. Richmond & D. R. Co., 3 I. C. C. Rep. 512, (**94**).

In a recent conference ruling (Oct. 12th, 1908) the Commission has held that 46-trip monthly school tickets, although properly limited to children and young persons between certain ages (as for instance, from 12 to 21 years of age), may not be restricted to pupils in attendance on schools of a certain kind or class to the exclusion of those attending various other kinds of schools. The Commission here said:

"The carrier may not inquire into the mission, errand or business of the passenger as a condition of fixing the transportation rate which such passenger shall pay."

157. Passes and Reduced Rates—Rules of Construction Applicable to Sections 1 and 22.

As heretofore stated, the giving of a free pass or the allowance of reduced rates is merely a form of discrimination among individuals.[43] Two sections of the Act besides Sections 2 and 3 deal directly with this particular form of discrimination.

Section 22 (which, except for certain slight changes by the amendments of March 2, 1889, and February 8, 1895, was contained in the original Act) specifies exceptions in favor of certain classes of individuals to whom the carriers may properly allow free or reduced transportation. In I. C. C. *v.* Baltimore & O. R. Co.[44] the Supreme Court held that this section was rather illustrative than exclusive and intimated that a number of the excepted classes might have been given free or reduced rates by reason of differing circumstances and conditions, without the insertion of Section 22.[45]

In re Exchange of Free Transportation,[46] however, the Commission took a different view of the Amendment of 1906 to Section 1, which forbids the giving of free passes except to certain

(43) Milk Prod. Ass'n. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 163, (220).
Re Charge to Grand Jury, 66 Fed. 146, (1895).
Supra, §125.

(44) 145 U. S. 263, 278; 36 L. Ed. 699; 12 Sup. Ct. 844, (91-C).

(45) Compare U. S. v. Wells Fargo Exp. Co., 161 Fed. 606, 617, (636).

(46) 12 I. C. C. Rep. 39, (461).
See also Ex Parte Koehler, 31 Fed. 315, 321-322, (1887).
21st Ann. Rep. 27-28.

specified parties, holding that the proviso was exclusive and to be strictly construed.

158. Same Subject—Cases Under Section 22.

Under Section 22, carriers may make a special rate for fish and eggs for the Government Fish Commission,[47] and also for supplies for Indian Schools,[48] such transportation being "for the United States."

The question as to whether or not a carrier may discriminate between ministers of different denominations was raised but not decided in one case before the Commission.[49]

Section 22 of the original Act of 1887 provided that "nothing in this Act shall apply to the issuance of mileage, excursion or commutation tickets." Under this provision it was intimated by the Court in one case that carriers were not bound to publish mileage or excursion rates.[50] The Commission, however, held that the provisions of the Act with regard to publication, discriminations and reasonable charges applied to the enumerated parties or transportation.[51] The Act of February 8, 1895, cleared the matter up by substituting "prevent" for "apply to."

(47) Re U. S. Fish Commission, 1 I. C. C. Rep. 21, (6).

(48) Re Indian Supplies, 1 I. C. C. Rep. 16 (3).
See also Administrative Rulings, No. 33, (Feb. 3rd, 1908), No. 36, (Feb. 4th, 1908), No. 65, (April 18th, 1908), and Tar. Circ. 15-A Rul. No. 75, (May 27th, 1907).

(49) Emerson v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 289, (190).
See also supra, §128.

(50) I. C. C. v. Baltimore & O. R. Co., 43 Fed. 37, 41, (91-B).

(51) Pittsburg C. & St. L. R. Co. v. Baltimore & O. R. Co., 3 I. C. C. Rep. 465, (91-A).
Gen'l order of Sept. 18th, 1906.
Larrison v. Chicago & Gr. Tr. R. Co., 1 I. C. C. Rep. 147, (21).
Assoc. Wholesale Gr. v. Missouri Pac. R. Co., 1 I. C. C. Rep. 156, (23).
Cf. also Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 221, (1907).
Re Passenger Tar. & Rate Wars, 2 I. C. C. Rep. 513, 528, (1889).
See also Tar. Circ. 15-A, Rulings Nos. 52 and 68.
Admin. Rul. of Oct. 12, 1908, supra, §156.

Party rates tickets are neither commutation, mileage nor excursion tickets within the meaning of Section 22.[52]

159. Same Subject—Who May Lawfully Receive Free Passes.

Under paragraph 4 of Section 1 of the Act as amended in 1906, the question arose before the Commission as to whether employes of Telegraph Companies might properly be given passes. It was held that it was legal to give a pass to an employe who was constructing or maintaining a telegraph line on the railroad, or system, to enable him to travel free on such road and in such work, but that it was illegal to give passes to employes not so employed, or for transportation over parts of the road in connection with which they were not working.[53]

In another case the Commission held that it was illegal to grant passes to the caretakers of newspapers,[54] or of milk.[55]

Household servants travelling with a member of the family entitled to a pass are included in the "family" as the term is used in the Act.[56]

(52) Pittsburg C. & St. L. R. Co. v. Baltimore & O. R. Co., 3 I. C. C. Rep. 465, (91-A).

I. C. C. v. Baltimore & O. R. Co., 43 Fed. 37, (91-B); 145 U. S. 263; 36 L. Ed. 699; 12 Sup. Ct. 844, (91-C).

(53) Re Railroad and Telegraph Companies, 12 I. C. C. Rep. 10, (446).

(54) Re Free Transportation of Newspaper Employes, 12 I. C. C. Rep. 15, (448).

Cf. Re Carriage of Persons Free, etc., by B. & M. R. Co., 5 I. C. C. Rep. 69, 82, (1891).

(55) Administrative Ruling No. 21, (Jan. 6th, 1908).

Passes to caretakers must be in the form of trip passes, limited to the journey on which the holder acts as caretaker, and annual or time passes to caretakers are unlawful. The pass may cover the return journey.

Admin. Rul. No. 37, (Feb. 4th, 1908).

Where, however, an employe of a produce company was granted a pass to go to a point on the carrier's line and return as a caretaker of certain fruit, on his failure to secure a return shipment the carrier was required to collect the full fare from him.

Admin. Rul. No. 1, (Nov. 4th, 1907).

The Commission holds that the term "fruit" includes perishable vegetables.

Tar. Circ. 15-A, Rul. No. 62.

(56) Administrative Ruling No. 93, (June 29th, 1908).

By the Amendment of April 13th, 1908, it was made lawful for carriers to give transportation to remains of persons killed in their employ and to their families and also to "furloughed, pensioned and superannuated employes." [57]

Passes granted to State Railroad Commissioners cannot lawfully be used in interstate journeys.[58]

Franks given by Express Companies to their officers or to the officers of railroads are not passes, and are not lawful, although used only for personal packages and not for business consignments.[59]

Where it appeared that prior to the passage of the Act of 1887, a man and wife had been injured on the defendant road, and in consideration of their releasing all damages, the road had agreed to give them each a free pass for life, the Circuit Court held that the contract was capable of specific performance after January 1st, 1907, in spite of the protest by the carrier that to enforce it would amount to a violation of the Act prohibiting the granting of free passes.[60]

(57) The Commission so ruled prior to the passage of this Amendment.

See Admin. Rul. Nos. 18, 55.

In a Conference Ruling on Oct. 13th, 1908, the Commission held that under this Amendment a pass may be issued to a *bona fide* ex-employee of any carrier subject to the Act, who is traveling for the purpose of entering the service of any such common carrier, whether such service has or has not previously been arranged for.

In a Ruling rendered on Oct. 16th, 1908, the Commission held that the provision permitting free transportation to the families of employees killed in the service of common carriers does not include the families of employees who died a natural death while in the service of common carriers.

See also Tar. Circ. 15-A, Rulings 62-66, and Admin. Rul. No. 96, (June 30th, 1908), as to classes of persons entitled to passes and as to the proper form in which they should be issued.

(58) Admin. Rul. No. 35, (Feb. 3rd, 1908).
Cf. Rul. No. 26, (Jan. 6th, 1908).

(59) U. S. v. Wells Fargo Exp. Co., 161 Fed. 606, (636).

(60) Mottley v. Louisville & N. R. Co., 150 Fed. 406, (451-A).

The Supreme Court remanded this case to the Circuit Court with directions to dismiss for want of jurisdiction and did not pass on the point above discussed.

Louisville & N. R. Co. v. Mottley, 211 U. S. 149, (451-B).

The attitude of the Commission would seem to be to give a strict construction to the provisions permitting the issuance of free passes and to sanction free transportation only where the terms of the Act clearly require it.[61]

(61) See 21st Ann. Rep. 27-8.
Also supra, §157.

CHAPTER XIV.

DISCRIMINATIONS AND PREFERENCES—DISCRIMINATIONS BETWEEN INDIVIDUALS IN RESPECT TO CHARGES, BY REBATES AND OTHER DEVICES.

160. In General — Device not Necessary — Intent and Guilty Knowledge.
161. Mere Refunding of Charges not Improper.
162. Instances of Illegal Devices —Payments to Shippers on Account of Alleged Services Rendered the Carrier.
163. Same Subject—Commissions for Securing Traffic.
164. Same Subject—Divisions of Through Rates to Railroad Companies Controlled by Shippers.
165. Same Subject—Rates Ostensibly Open to All but in Reality Restricted to a Favored Few.
166. Same Subject—Discrimination in Favor of the Carrier Itself in the Capacity of a Shipper.
167. Same Subject—Compromise of Debt by Allowances on Transportation Charges.
168. Same Subject — Miscellaneous "Devices."

160. In General—Device not Necessary—Intent and Guilty Knowledge.

In order to constitute a rebate it is not necessary that there be a "device." A direct payment is forbidden as well as an indirect one, and the expression in the Act "by any device" means "in any manner" direct or indirect.[1]

In Scofield *v.* Lake Shore & M. S. R. Co.,[2] Commissioner Bragg said:

"The statute is one that may be violated without any 'device' on the part of the carrier, and it is equally true that the ingenuity of man cannot invent a 'device' by which a carrier, subject to its

(1) U. S. v. Tozer, 37 Fed. 635, 636-637; 2 L. R. A. 444n, (**70**-A).
U. S. v. Standard Oil Co., 148 Fed. 719, 720-721, (**447**).
Armour v. U. S. 153 Fed. 1, 15-17; 82 C. C. A. 135, (**476**-A); 209 U. S. **56**, 69-72; 52 L. Ed. 428; 28 Sup. Ct. 423, (**476**-B).

(2) 2 I. C. C. Rep. 90, 121, (**51**).

provisions, can give an unlawful preference without incurring the penalties and remedies provided by this statute."[3]

In Shamberg *v.* Delaware, L. & W. R. Co., [4] the same Commissioner said:

"In the contemplation of the statute, any methods, however skilfully devised, by which an unlawful result is effected, become devices for the end attained. In a case of this kind the law deals with the results produced, and it is not material what means may be employed for the purpose. Whether the means be direct or indirect, open or covert, is of no importance if they in fact culminate in what the law forbids. The offense is fully seen in the final result, but, the result being unlawful, the condemnation of the statute falls alike upon the result itself and the means by which it is reached. When the ultimate thing done is unlawful, the steps for the purpose of its perpetration are equally unlawful, and the parties engaged in the transaction must be presumed to have intended by their acts the breach of the law that ensues as the necessary consequence." [5]

The prohibition of the Act is applicable to every method of dealing by a carrier by which the forbidden result is brought about. Bad faith or fraudulent intent to evade its provisions is immaterial, either under the original Act or under the Elkins Act.[6]

(3) But see Coxe v. Lehigh Val. R. Co., 4 I. C. C. Rep. 535, 570, 573, 574, (124-A).

McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 641, (289).

(4) 4 I. C. C. Rep. 630, 654, (127).

(5) See also Re Division of Joint Rates, 10 I. C. C. Rep. 385, 400, (359).

(6) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361, 396-7; 50 L. Ed. 515; 26 Sup. Ct. 272, (339-B).

This decision turned principally on the question of charging less than published rates, but the question of discrimination was also involved. Under the Hepburn Act a discrimination or rebate is not criminal unless "knowingly" given or received.

See also Standard Oil Co. v. U. S., 164 Fed. 376, (530-B).

Compare Stone v. Detroit G. H. & M. R. Co., 3 I. C. C. Rep. 613, 642, (100-A).

Willson v. Rock Cr. R. Co., 7 I. C. C. Rep. 83, 89, (219), (dissenting opinion).

U. S. v. Milwaukee Refg. Co., 142 Fed. 247, 252, (411-A).

As to intent and guilty knowledge in criminal cases see infra, Chap. XXVII, §348.

161. Mere Refunding of Charges not Improper.

The mere refunding to a shipper of part of transportation charges does not constitute a rebate, where a higher rate has been exacted from him than should properly have been charged.[7] Indeed, delay in refunding over-charges may in itself constitute a device for producing an unjust discrimination, where such over-charges are promptly repaid to complainant's competitors.[8]

In Chicago & A. R. Co. *v.* U. S.,[9] a case involving the legality of certain repayments by a carrier to a shipper on account of the use of its tracks, Judge Baker said:

"As courts rightly are keen to penetrate an innocent appearing device to reach an illegal transaction, they should also be alert to save a lawful act though it be hid under a false cover. These plaintiffs in error should not be punished for methods of bookkeeping if the false entries represented in fact a lawful arrangement. . . . S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A railroad may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in cancelled legal demands against the railroad. The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. So if the full rate be paid, either in money or in money's worth, the parties cannot be guilty of rebating. Of course, the money's worth part of the payment might itself be used as a device whereby the property would be carried in interstate commerce at less than the published rate."

(7) Re Export Trade of Boston, 1 I. C. C. Rep. 24, 26-27, (7).
Sanger v. Southern Pac. R. Co., 3 I. C. C. Rep. 134, (81).
Carriers are bound, however, to investigate claims for over-charges carefully before paying them, and a delivering carrier does not escape responsibility in such cases by acting under the authority of a connecting line.
See Admin. Rul. Nos. 15 and 68.

(8) Phelps v. Texas & Pac. R. Co., 6 I. C. C. Rep. 36, 50, (171).

(9) 156 Fed. 558, 560; 84 C. C. A. 324, (430-B).
See infra, §162.

162. Instances of Illegal Devices—Payments to Shippers on Account of Alleged Services Rendered the Carrier.[10]

In re Allowance to Elevators,[11] a case involving the legality of allowances on freight rates to a large shipper on account of services in elevating and transferring grain, Chairman Knapp said:

"It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated, because any resulting discrimination may not be undue, but the situation created cannot be wholly satisfactory."

In the above case it was held, however, that the payments did not constitute an illegal device, since they had been made in good faith and amounted only to reasonable compensation for the service rendered.

The exact basis for the above decision would seem somewhat difficult to understand. From the opinion it would appear that the question presented was in its essence one of a preference of Omaha grain dealers over those at St. Louis and other points, by an elevation allowance at Omaha on grain reconsigned to eastern points, and the refusal of such an allowance at other localities. It would seem that the allowance was made at Omaha by the action of carriers whose eastern or western termini were at Omaha, in order to draw eastern grain shipments through this point, and it would perhaps appear difficult to see why, under the decisions, this circumstance did not justify the allowance.[12] The same case came before the Commission on two subsequent occasions, after traffic conditions had materially changed at the points in question. The Commission first ordered the reduction of the allowance to a figure not exceeding the cost of service,[13] and later abolished it altogether, holding that under the altered conditions, any allowance to

(10) See Section 15, par. 3, of the Act giving the Commission power to determine what is a reasonable allowance to shippers for services rendered; infra, §283.

(11) 10 I. C. C. Rep. 309, 326, (351-A).

(12) See infra, Chaps. XII and XVII, also §§187-190.

(13) Re Allowance to Elevators, 12 I. C. C. Rep. 85, (351-B).

the elevator owners produced an unjust discrimination as against shippers not using elevators.[14]

Payment of a "switching charge" to a shipper for switching his own freight over his own private tracks is clearly illegal, not even purporting to be on account of any service which the railroad was itself bound to perform as a common carrier.[15] The payment by a carrier of drayage charges for hauling freight to or from its terminal to certain shippers and not to others also constitutes an illegal rebate;[16] and the same conclusion has been reached with reference to the payment of car-mileage to a company controlled by a large shipper, for the use of private stock cars, where the amount of the allowance was so large as to pay for the cars inside of two years.[17]

Section 15, paragraph 3, of the Act, as amended in 1906, gives the Commission power to determine the amount to be paid by carriers to shippers for services or facilities.[18]

163. Same Subject—Commissions for Securing Traffic.

Although in some cases it may be proper for a carrier to pay

(14) Re Allowance to Elevators, 14 I. C. C. Rep. 315, (**351**-B).
St. Louis Tr. Bur. v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 317, (**698**).

(15) U. S. v. Chicago & A. R. Co., 148 Fed. 646, (**430**-A).
Chicago & A. R. Co. v. U. S., 156 Fed. 558; 84 C. C. A. 324, (**430**-B).
Central Yellow Pine Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 546, (**369**-A).
Cf. also General El. Co. v. New York Cent. & H. R. R. Co., 14 I. C. C. Rep. 237, (**689**).
Solvay Co. v. Delaware, L. & W. R. Co., 14 I. C. C. Rep. 246, (**690**).

(16) Hezel Milling Co. v. St. Louis, A. & T. H. R. Co., 5 I. C. C. Rep. 57, (**140**).
Re Divisions of Joint Rates, 10 I. C. C. Rep. 661, (**375**).
Re Allowances for Transportation, 14 I. C. C. Rep. 619, (**725**).
Cf. also Stone v. Detroit G. H. & M. R. Co., 3 I. C. C. Rep. 613, (**100**-A).
I. C. C. v. Detroit G. H. & M. R. Co., 57 Fed. 1005, (**100**-B).
Detroit G. H. & M. R. Co. v. I. C. C. 74 Fed. 803; 43 U. S. App. 303; 21 C. C. A. 103, (**100**-C).
I. C. C. v. Detroit G. H. & M. R. Co., 167 U. S. 633; 42 L. Ed. 306; 17 Sup. Ct. 986, (**100**-D).
Wight v. U. S., 167 U. S. 512; 42 L. Ed. 258; 17 Sup. Ct. 822, (**223**).

(17) Shamberg v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 630, (**127**).

(18) See infra, §283, for the text of this provision.

commissions to persons for securing traffic for it, the payment of "lighterage charges" to the transportation agent of a shipper is illegal where a mere device to give the shipper a rebate.[19] So, also, is the payment of commissions to a company owned by a shipper, ostensibly for soliciting traffic, but really as device to allow a rebate.[20]

The division of commissions by an agent of the railroad with a shipper may amount to a rebate for which the railroad is responsible.[21]

164. Same Subject—Divisions of Through Rates to Railroad Companies Controlled by Shippers.

Divisions of so-called through rates by connecting lines to private "tap-line" railroads, owned by shippers, and not common carriers, constitute illegal rebates;[22] but where such roads are *bona fide* common carriers, file tariffs, and render statistical reports to the Commission, reasonable divisions of through rates to them are not illegal, even though their entire capital stock is owned by a shipper.[23]

Where a Terminal Company, owned by a shipper, received ex-

(19) U. S. v. Delaware, L. & W. R. Co., 152 Fed. 269, (**452**).

(20) U. S. v. Milwaukee Refg. Tr. Co., et al., 142 Fed. 247, (**411**-A). 145 Fed. 1007, (**411**-B).
Thomas & Taggart v. U. S., 145 Fed. 74; 156 Fed. 897, (**538**).
See also Re Passgr. Tar. & Rate Wars, 2 I. C. C. Rep. 513, (1889).
Tar. Circ. 15-A, Rul. 82, and amendment to same of May 12, 1908, (page 12 of Supp. No. 1 to Tar. Circ. 15-A).

(21) Re Underbilling, 1 I. C. C. Rep. 633, 647, (1888).
Re Passenger Tar. etc., 2 I. C. C. Rep. 513, (1889).
Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 221-2, (1907).
See also Administrative Ruling No. 7, (Nov. 18th, 1907).

(22) Central Yel. P. Asso. v. Illinois Cent. R. Co., 10 I. C. C. Rep. 505, 545-546, (**369**-A).
U. S. v. Atchison, T. & S. F. R. Co., 142 Fed. 176, 191-3, (**406**).
U. S. v. Chicago & A. R. Co., 148 Fed. 646, (**430**-A).
Chicago & A. R. Co. v. U. S., 156 Fed. 558; 84 C. C. A, 324, (**430**-B).

(23) Central Yel. P. Asso. v. Vicksburg, S. & P. R. Co., 10 I. C. C. Rep. 193, 216, (**344**).
The Commission will hesitate, however, in allowing divisions of through rates to such roads under the authority conferred in Section 15.
Star Co. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 364, 372, (**703**).

cessive divisions of through rates from connecting lines, the Commission held that this constituted a rebate,[24] although where the Terminal Company was owned not by the shipping company itself, but merely by its officers, it would seem to have considered the transaction a legal one.[25]

So also, excessive divisions of through rates to a switching railroad, organized as a means of securing rebates, are illegal,[26] and the same is true where the carrier receiving the division of the rate is a Boat Line. If the amount is reasonable, it is not illegal, but if gross it amounts to a rebate to the shipper owning the Boat Line.[27]

165. Same Subject—Rates Ostensibly Open to All but in Reality Restricted to a Favored Few.

If a carrier puts a rate into effect for the obvious purpose of allowing a special rate to a particular shipper this might, of course, be held to constitute an illegal device to give such shipper a preference.[28] It is believed, however, that in its eagerness to protect small independent shippers from the trusts, the Commission has perhaps confused such cases with those where the favored shipper is properly entitled to a concession in rates because of the less cost of service incurred in connection with his traffic. Thus the Commission has condemned any advantage in rates to shippers of oil in tank cars over shippers in barrels, although the former method was considerably cheaper to the railroads, tank shipments being almost entirely by the Standard Oil

(24) Re Division of Joint Rates, 10 I. C. C. Rep. 385, 661, 673, (**359 and 375**).

(25) Re Division of Joint Rates, 10 I. C. C. Rep. 661, 673-674, (**375**).

(26) Re Transportation of Salt from Hutchinson, 10 I. C. C. Rep. 1, (**333**).

(27) Re Transportation of Salt, 10 I. C. C. Rep. 148, 171-2, (**342**). In this connection it must be remembered that an initial carrier may naturally be expected to secure a large proportion of a through rate from connecting lines, where they are in competition with one another to secure the traffic.

See Re Transportation of Salt, 10 I. C. C. Rep. 148, 169, (**342**).

(28) See St. Louis Tr. Bur. v. Chicago B. & Q. R. Co., 14 I. C. C. Rep. 317, 331, (**698**).

Company.[29] The Supreme Court, however, refused to enforce the order issued in the last of these cases, pointing out clearly the error of the Commission.[30]

In another case the Commission would seem to have reached a doubtful decision by reason of the influence of similar considerations, holding that shippers of cotton in round bales were not properly entitled to less rates than those shipping in square bales, although it was admitted that the cost of carriage in the latter case was much greater.[31]

Such decisions would greatly retard commercial progress. A shipper who by foresight or by the expenditure of capital invents a cheaper way of getting his freight to market clearly should not be prevented from reaping the benefit of his initiative or of his investment merely for the protection of vested interests in obsolete methods.[32]

166. Same Subject—Discrimination in Favor of the Carrier Itself in the Capacity of a Shipper.

Where a carrier, either directly or by ownership of stock in another corporation, engages in the business of buying and selling commodities which it transports, it cannot favor itself or the company in which it is interested merely by the device of charging itself full rates and losing money on the mercantile end of the business. In such cases it is bound to show that the price at which it is selling its goods is sufficient to cover the ordinary cost of manufacture and sale, added to the tariff rates; otherwise the transaction will be held to constitute a violation of the Act.[33]

(29) See Rice v. Louisville & N. R. Co., 1 I. C. C. Rep. 503, (**42**).
Scofield v. Lake S. & M. S. R. Co., 2 I. C. C. Rep. 90, 111, (**51**).
Re Relative Tank and Bbl. Rates on Oil, 2 I. C. C. Rep. 365, (**65**).
Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, (**111**).
Rice v. Cincinnati, W & B. R. Co., 5 I. C. C. Rep. 193, (**147**).
Independent Ref. Asso. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, (**155-A**).

(30) Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208; 28 Sup. Ct. 268; 52 L. Ed. 493, (**155-F**).

(31) Planters' Comp. Co. v. Cleveland C. C. & St. L. R. Co., 11 I. C. C. Rep. 382, 402-403, (**402**).

(32) See also supra, §§65-68, and §§149-151.

(33) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361; 50 L. Ed. 515; 26 Sup. Ct. 272, (**339-B**).
In several cases before the Commission prior to this decision that

167. Same Subject—Compromise of Debt by Allowances on Transportation Charges.

From a decision by the Supreme Court, construing a Colorado statute similar to the Federal Act, it would seem that the compromise of a liquidated debt owed by a railroad to a shipper, by an allowance on freight rates, is not illegal, where the debt released is clearly equal to the amount of the allowance. Where, however, the fairness of the transaction is not obvious, the transaction amounts to an unjust discrimination or rebate.[34] In the case referred to it was held that the set-off relied on was so indefinite as to be inadmissible as a defense to the charge of discrimination in favor of the shipper with whom the alleged compromise was made.

The Supreme Court has not passed expressly on the question as to whether, under the Act, freight rates may be paid in anything but money, but the trend of the decisions by the Commission and the Circuit Courts is clearly to the effect that this is not permissible. The Commission has recently said that all arrangements for the purchase of property with transportation were contrary to the principles of the Act, and that a carrier might not properly pay for a switch by allowances out of freight rates.[35]

body said that it was powerless to prevent such a "device," and that all it could do was to see to it that the rates charged independent shippers were reasonable.

Coxe v. Lehigh Valley R. Co., 4 I. C. C. Rep. 535, (**124**-A).

Haddock v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 296, (**120**).

Willson v. Rock Creek R. Co., 7 I. C. C. Rep. 83, 98, (**219**), (see dissenting opinion).

Re Chicago G. W. R. Co., 7 I. C. C. Rep. 33, (**214**).

McGrew v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 330.

Since the decision by the Supreme Court, the Commission might take a different view.

(34) Goodridge v. Union Pac. R. Co., 37 Fed. 182, (**68**-A).

Union Pac. R. Co. v. Goodridge, 149 U. S. 680; 37 L. Ed. 986; 13 Sup. Ct. 970, (**68**-B).

See also I. C. C. v. Chesapeake & O. R. Co., 128 Fed. 59, 64, (**339**-A), (semble).

Compare Lincoln Bd. of Tr. v. Burlington & M. R. Co., 2 I. C. C. Rep. 147, 150, (**55**).

(35) Weleetka L. & W. Co. v. Fort S. & W. R. Co., 12 I. C. C. Rep. 503, 505, (**551**).

See also Admin. Rul. No. 48, holding that a shipper may not properly offset an independent money demand against a claim for freight. Also

168. Same Subject—Miscellaneous "Devices."

A lease of a wharf by a Terminal Company to a particular shipper, relieving him from wharfage charges exacted from other shippers, and giving him special facilities for storing and treating commodities which other shippers could not obtain at like expense, has been held to constitute an undue preference, where by reason of lack of space the Terminal Company could not have made similar arrangements with complainant's competitors.[36]

The placing of false weights on goods by a shipper, with the connivance of the carrier, is an illegal "device," as is the giving of rebates ostensibly on shipments made prior to the Act in return for present traffic at regular rates.[37]

The allowance of free cartage,[38] or of free storage [39] to some and not to others, or the repayment of storage charges to favored shippers,[40] or the exaction of a switching charge against one and not against others,[41] may amount to a rebate forbidden by the Act.

The transportation of local freight at proportional through

Admin. Rul. No. 95, (June 30th, 1908), and Tar. Circ. 15-A, Rule 67, where the Commission held that nothing but money could lawfully be accepted in payment for transportation.

But see Chicago & A. R. Co. v. U. S., 156 Fed. 558, 560; 84 C. C. A. 324, (430-B).

Smith v. Northern Pac. R. Co., 1 I. C. C. Rep. 208, 211-212, (28).

Curry v. Kansas & C. P. R. Co., 58 Kas. 6; 48 Pac. 579, (1897).

See also U. S. v. Atchison, T. & S. F. R. Co., 163 Fed. 111, (662).

U. S. v. Chicago, I. & L. R. Co., 163 Fed. 114, (663).

The last two cases really turned on the question of departure from tariff rates under Section 6 and the Elkins Act.

See infra, Chaps. XIX and XXVII.

(36) Eichenberg v. Southern Pac. R. Co., 14 I. C. C. Rep. 250, (691).

(37) Re Underbilling 1 I. C. C. Rep. 633, (1889).

In this case several other devices are enumerated and discussed.

See also Re Rates, etc., 13 I. C. C. Rep. 123, 212, (1908).

Admin. Rul. No. 24.

(38) U. S. v. Chicago & A. R. Co., 148 Fed. 646, (430-A).

(39) American W. Asso. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, (247).

(40) U. S. v. Standard Oil Co., 148 Fed. 719, (447).

(41) Ohio Coal Co. v. Whitcomb, 123 Fed. 359; 59 C. C. A. 487, (315).

rates on presentation of false "expense bills" purporting to be receipts for freight for the first part of a continuous through journey, is obviously an illegal device.[42]

The construction of a coal tariff so as to include the price of the coal as to some shippers and not as to others is an illegal device.[43]

A method of estimating weights on oil shipments, whereby tank shippers (Standard Oil Company) were given an improper advantage over shippers in barrels, has been held to amount to a rebate.[44] The practice of estimating weights is not, however, necessarily improper if fairly carried out.[45]

Unreasonable allowances to tank shippers on account of leakage have also been held to constitute a violation of the Act.[46]

The reservation by an initial carrier of the right to route traffic beyond its own line, as a condition of allowing through rates, does not amount to an unjust discrimination.[47]

(42) U. S. v. Michigan Cent. R. Co., 43 Fed. 26, (**108**).
Cf. also Rice v. St. Louis S. W. R. Co., 5 I. C. C. Rep. 660, (**168**).

(43) Re Atchison, T. & S. F. R. Co., 10 I. C. C. Rep. 473, (**367**).

(44) Rice v. Cincinnati W. & B. R. Co., 5 I. C. C. Rep. 193, 226, (**147**).

(45) See Barrow v. Yazoo & M. V. R. Co., 10 I. C. C. Rep. 333, 334, (**353**).
White v. Baltimore & O. S. W. R. Co., 12 I. C. C. Rep. 306, (**512**).
But cf. Romona Stone Co. v. Vandalia R. Co., 13 I. C. C. Rep. 115, 117, (**583**).

(46) Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 156, (**111**).
Rice v. Cincinnati W. & B. R. Co., 5 I. C. C. Rep. 193, 227, (**147**).

(47) Southern Pac. R. Co. v. I. C. C., 200 U. S. 536; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302-E**).

CHAPTER XV.

DISCRIMINATIONS AND PREFERENCES—DISCRIMINATION BETWEEN INDIVIDUALS IN RESPECT TO TRANSPORTATION MATTERS OTHER THAN CHARGES PROPER.

169. In General—Burden of Proof.
170. Car Distribution.
171. Same Subject—How Far Carriers may Regard Their Own Interest and Convenience in Distributing Cars.
172. Same Subject—Methods of Distributing Cars for Coal.
173. Same Subject—Cars for Oranges.
174. Same Subject—Cars for Company Coal.
175. Same Subject—Foreign Fuel Cars.
176. Same Subject — Individual or Private Cars—Decisions by the Commission.
177. Same Subject—Federal Decisions on Distribution of Individual Cars.
178. Switch Connections.
179. Miscellaneous Matters.

169. In General—Burden of Proof.

It might be said that where two persons are charged the same rate, but one receives better service than the other, since the value of the service to the former is greater than to the latter, this in the long run amounts to the same thing as according the same service to both and charging one a higher rate. This view would bring practically every case of discrimination among individuals under Section 2, but it is not believed that the language of Section 2 will reasonably bear such an interpretation.

There are, of course, a number of cases in which it is difficult to decide whether there is presented a discrimination in charges under Section 2, or a preference in other respects under Section 3. It is here proposed to take up such cases of discrimination among individuals as would seem to fall under Section 3 only.

Section 1 of the Act, as amended in 1906, makes it the statutory duty of the carrier to provide and furnish transportation upon a reasonable request therefor, and provides that the term transportation "shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, etc." The Circuit Court of Appeals for the Fourth Circuit has recently held, in

view of this provision, that "when it is shown that the carrier has not supplied the facilities demanded, the burden is upon the defendant, in order to exonerate itself from such charge of undue preference, to show that it is *pro rating* its cars fairly and equally among all the operators who are similarly situated and engaged in transporting freight over its lines." [1]

170. Car Distribution.

In many occupations, particularly in the mining of coal, success or failure depends upon an adequate and regular supply of cars in which to ship the product, and the railroads thus have it in their power to ruin one shipper and to bring prosperity to another by manipulation of the car supply to either.[2]

In times when cars are plenty, all shippers can usually secure as many as they need, but occasionally, on account of a strike or of an unusual demand for cars in a certain region, there is what is known as a "car famine." The available cars not being sufficient to meet the demands of all shippers, great opportunity for favoritism presents itself.

A railroad is required, as a common carrier, to maintain only sufficient equipment to handle its ordinary business, and need not keep on hand sufficient cars to meet the demand during an unusual rush. At such a time it does its whole duty if it distributes its available equipment ratably among all shippers on some equitable basis, without unduly preferring any one.[3]

(1) U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 165 Fed. 113, 125, (**495**-B).

(2) See Fifer C. in Parks v. Cincinnati & M. V. R. Co., 10 I. C. C. Rep., 47, 51, (**337**).

U. S. ex rel. Kingwood Co. v. West Va. N. R. Co., et al., 125 Fed. 252, 256, (**320**-A).

(3) Riddle Dean & Co. v. Pittsburg & L. E. R. Co., 1 I. C. C. Rep. 374, 386, (**34**).

Riddle Dean & Co. v. New York, L. E. & W. R. Co., et al., 1 I. C. C. Rep., 594, 603, (**43**).

Hawkins v. Lake Shore and M. S. R. Co., 9 I. C. C. Rep., 207, 212, 214, (**303**).

Cox v. St. Louis & S. F. R. Co., 14 I. C. C. Rep. 464, (**708**).

Helliwell v. Grand Tr. Ry. of Can., 7 Fed. 68, (1881).

U. S. ex rel. Logan Coal Co. v. Penna. R. Co., 154 Fed. 497, 505, (**511**).

If it refuses to furnish cars to any shipper while furnishing them to others similarly situated, this is an undue preference forbidden by the Act, which will entitle the prejudiced shipper to reparation and to such other relief as the Act affords.[4] The same is, of course, true where the railroad refuses to give a shipper cars except on compliance with an unreasonable rule, not imposed on his competitors.[5]

Where a railroad makes an arrangement with certain warehousemen under which they are permitted to locate along its right of way, and adopts a rule requiring that all orders or requisitions for cars in which to ship grain stored therein must be made through the warehousemen, the latter thereby become the agents of the carrier and it is bound to see to it that no unjust discrimination results to shippers having grain stored in such warehouses.[6]

171. Same Subject—How Far Carriers May Regard Their Own Interest and Convenience in Distributing Cars.

The question as to what extent a railroad may regard its own interest in distributing cars in time of car-famine has given rise to a number of decisions.

A carrier is not required to allow cars to go off its own line.[7] Similarly, it is not an undue preference to refuse cars to one desir-

State ex rel. McComb v. Chicago, B. & Q. R. Co., 71 Neb. 593, 99 N. W. 309, (1904).

See also Richmond Elevator Co. v. Pere M. R. Co., 10 I. C. C. Rep. 629, 637, (372).

Jessup Co. v. Piper, 133 Fed. 108, (1902).

(4) Heck v. East Tennessee, Va. & Ga. R. Co., et al., 1 I. C. C. Rep. 495, (41).

Hawkins v. Lake S. & M. S. R. Co., et al., 9 I. C. C. Rep. 207, 212, (303).

Eaton v. Cincinnati, H. & D. R. Co., 11 I. C. C. Rep. 619, (431).

As to whether discriminations between non-competitive shippers or commodities are forbidden by the Act, see supra, §§127-130.

(5) MacLoon v. Chicago & N. W. R. Co., 5 I. C. C. Rep. 84, (141).

(6) U. S. ex rel. Northwestern Warehouse Co v. Oregon R. & N. Co., 159 Fed. 975, (587).

(7) Riddle Dean & Co. v. Pittsburg & L. E. R. Co., 1 I. C. C. Rep. 374, 385-386, (34).

See also Memphis Frt. Bur. v. Fort Smith & W. R. Co., et al., 13 I. C. C. Rep. 1, 8, (561).

Wagner & Co. v. Detroit & M. R. Co., et al., 13 I. C. C. Rep., 160, (591).

ing to ship into an embargoed territory, although cars are being furnished to others shipping to non-embargoed points.[8]

In one case the Commission intimated that the railroad might properly use its cars in transporting commodities yielding it a greater return in freight,[9] but in an earlier case it held that a refusal to furnish cars was not justified by the fact that they could be more profitably employed in transporting other commodities.[10] In still another case it was held that the railroad was not justified, in time of car-famine, in placing all its cars in the hands of a few large shippers, although the cars were thus able to do greater service.[11]

It would seem that, in time of scarcity of cars for coal shipments, a railroad is justified in refusing to allow coal cars to be loaded by wagons on its railroad switch, permitting loading only from tipples or on private switches.[12] In a recent case Judge

Traer v. Chicago & A. R. Co., et al., 13 I. C. C. Rep. 451, 456, (**631-A**). In the case last cited Clark, C., said:

"The carrier owes a special duty to shippers who are entirely dependent upon it for transportation facilities. . . . It may not be compelled to nor may it voluntarily divert its equipment from its own line to shippers on another line when to do so would deprive its local shippers of needed equipment."

See also Schwager, et al. v. Great Nor. R. Co., 12 I. C. C. Rep. 521, 524, 525, (**553**).

Cox v. St. Louis & S. F. R. Co., 14 I. C. C. Rep. 464, (**708**).

(8) Parks v. Cincinnati & M. V. R. Co., 10 I. C. C. Rep. 47 (**337**).

(9) Anthony Salt Co., et al. v. Missouri Pac. R. Co., et al., 5 I. C. C. Rep. 299, 309 (**153**).

(10) Riddle Dean & Co. v. New York, L. E. & W. R. Co., et al., 1 I. C. C. Rep. 594, 604, (**43**).

(11) Red Rock Fuel Co. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 438, 456 (**404**).

(12) Thompson v. Penna. R. Co., 10 I. C. C. Rep. 640, (**373**).

Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; 125 Fed. 445, 450-451; 61 C. C. A. Rep. 405, (**308-A, 308B**).

Robinson v. Baltimore & O. R. Co., 129 Fed. 753; 64 C. C. A. 281, (1904).

Cf. Glade Coal Co. v. Baltimore & O. R. Co., 10 I. C. C. Rep. 226, (**347**).

Galena & C. V. R. Co. v. Rae, 18 Ill. 488, (1857).

Little R. & Ft. S. R. Co. v. Oppenheimer, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353, (1897).

Morris, in the District of Maryland, approved a regulation by the defendant company designed to promote prompt unloading and release of cars, whereby additional cars were allowed to mines unloading and returning within a certain average time cars allotted to them in the previous month.[13] This decision was reversed, however, by the Circuit Court of Appeals, holding that the regulation constituted an undue preference and that dispatch in unloading should be stimulated by proper demurrage charges against the tardy, and not by the allowance of extra facilities to the prompt.[14]

172. Same Subject—Methods of Distributing Cars for Coal.

Discriminations in car-distribution most frequently occur in reference to cars to different coal mines. The Act does not require railroads to establish a system of mine ratings and car-distribution unless this is necessary to prevent discrimination between its patrons.[15] In regions, however, where during certain seasons of year there is a shortage of cars, the carriers have generally adopted some method of apportioning their available equipment among the mines. No standard scheme has been approved by the Courts or Commission, it being recognized that different methods may suit different regions. The basis of distribution, however, should be the result of a disinterested and intelligent examination of the mines in the region by experts.[16]

In one case it was held that an equitable method of distribution

Choctaw O. & G. R. Co. v. State, 73 Ark. 373; 84 S. W. 502; 92 S. W. 26, (1904).

Compare also Hawkins v. Wheeling & L. E. R. Co., 9 I. C. C. Rep. 212, 214, (1902).

(13) U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. R. Co., 154 Fed. 108, 118, (495-A).

(14) U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 165 Fed. 113, 128, (495-B).

(15) Traer v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 165, 168, (679).

(16) U. S. Ex rel. Kingwood Coal Co. v. West Va., Nor. R. Co., 125 Fed. 252, 255, (320-A).

Various important considerations in determining the respective ratings of various mines are enumerated in the above case; see also the opinion in the same case before the Circuit Court of Appeals, 134 Fed. 198, 67 C. C. A. 220, (320-B).

As to different methods of rating see also State ex rel. McComb v. Chicago, B. & Q. Co., 71 Neb. 593; 99 N. W. 309, (1904).

was on the basis of the number of coke ovens operated.[17] This method has the distinct advantage of being entirely open, hence preventing any secret discrimination. In a later case, however, the Commission held that in spite of the advantage of this system, and although it was equitable when originally adopted in the Pocohontas district, it had become unfair under changing conditions. Its discontinuance was ordered, but no substitute suggested.[18]

In another case it was held that in making a basis for allotment it was unfair to new mines to count actual production in the past as two units and possible capacity as but one and that the rating must be based solely on the physical capacity of the mines to furnish coal for shipment.[19]

It is not proper to base a rating on the complainant's output at a time when he was wrongfully denied the use of cars.[20]

New mines may properly be allotted a reasonable number of cars until such time as their output is sufficient to determine their proper percentage.[21]

A system of distribution has been approved under which a number of extra cars were allotted to certain mines, well situated

(17) U. S. ex rel. Coffman v. Norfolk & W. R. Co., 109 Fed. 831, 837-8, (254).

See also U. S. ex rel. Greenbrier Coal Co. v. Norfolk & W. R. Co., 138 Fed. 849, (389-A); 143 Fed. 266; 14 C. C. A. 404, (389-B).

(18) Powhatan Coal Co. v. Norfolk & W. R. Co., 13 I. C. C. Rep., 69 (577).

(19) U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 165 Fed. 113, 130, (495-B), reversing 154 Fed. 108, (495-A).

See also, however, Rail and River Coal Co. v. Baltimore & Ohio R. Co., 14 I. C. C. Rep., 86, 93-96, (670).

(20) Eaton v. Cincinnati, H. & D. R. Co., 11 I. C. C. Rep. 619, 622 (431).

(21) U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. R. Co., 154 Fed. 108, 117, (495-A).

The decision in this case was reversed by the Circuit Court of Appeals on a number of points, but the point for which it is here cited was not passed on, 165 Fed. 113, (495-B).

See also Rail & River Coal Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 86, 93, (670). (An injunction to restrain the enforcement of the order in this case has been denied by the Court).

geographically, to make up for a charge of the same rate to them and to their worse situated competitors.[22]

Where several mines are owned by one shipper, it would seem proper to allow them to pool their percentages of cars and to throw all to one mine, so long as all the mines keep working, but it is not proper to allow a mine which is not being worked to retain its percentage and transfer it to another mine in the same ownership.[23]

It has recently been held that in estimating the pro-rata share of a given mine, all the cars allotted it must be counted, whether used in interstate or in intra-state shipments.[24]

173. Same Subject—Cars for Oranges.

The Commission has been asked to choose between two methods of car-distribution in force in the orange growing region of California. By one of these methods,—the "house-rule",—the available cars were distributed in proportion to the fruit ready for shipment in the packing houses. This method was advocated by the jobbers, while the growers contended that the fairer method was the "crop-holding rule," under which cars were allotted on the basis of the fruit on the trees. The Commission refused to commit itself to either method, stating that although the "crop-holding rule" seemed the fairer, the "house-rule" did not appear to be unduly discriminatory against the growers.[25]

174. Same Subject—Cars for Company Coal.

Where cars are delivered at a given mine to receive coal for use in engines of the delivering carrier, according to some authorities

(22) U. S. ex rel. Coffman v. Norfolk & W. R. Co., 109 Fed. 831, (**254**).

(23) U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 154 Fed. 108, 116, (**495-A**).
See also Rail & River Coal Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 86, 97, (**670**).

(24) Majestic Coal Co. v. Illinois Cent. R. Co., 162 Fed. 810, (**647**).
Chicago & A. R. Co. v. I. C. C., 000 Fed. 000, (**631-B**).
Cf. Reliance Works v. Southern Ry. Co., 13 I. C. C. Rep. 48, 54, (**575**).
Also supra §27.

(25) California Fr. Gr. Ex. v. Southern Pac. Co., 12 I. C. C. Rep. 553, (**560**).

these cars need not be counted against the share of the mine so receiving them.[26] Other cases, however, have taken the opposite view.[27] The latter decisions would seem to be unsound. The advantage given by the carrier in such cases does not really relate to transportation, but to the purchase of equipment, and this is not one of the matters covered by the Act.[28]

175. Same Subject—Foreign Fuel Cars.

A number of cases have arisen involving the question as to what is the proper method of reckoning cars sent by foreign roads for fuel coal.

In a case decided in 1901 by District Judge Jackson, in the Circuit Court for the District of West Virginia, it was held that a shipper who shipped no fuel coal to other railroads had no valid cause of complaint, by reason of the fact that in apportioning cars to the region in which his mine was located, the railroad did not charge against the percentage of shippers selling fuel coal to other railroads, the cars sent by such foreign roads for their coal.[29]

In a decision by Judge Holland, in the Circuit Court for the Eastern District of Pennsylvania, in July, 1907, it was held that it was not an unjust discrimination against the relator, a shipper of foreign railway coal, for defendant to enforce a method of car-distribution under which foreign fuel cars were charged against the rated capacity of the mines.[30]

In September, 1908, the Circuit Court of Appeals for the

(26) Chicago & A. R. Co. v. I. C. C. Rep., 000 Fed. 000, (631-B), (reversing Royal Coal Co. v. Southern Ry. Co., 13 I. C. C. Rep. 440), (630).

Lehigh Val. R. Co. v. Rainey, 112 Fed. 487, (1902).

In the first of the above cases the court said that shipments in company cars should be excluded in determining the capacity of the mines on which their ratings were based.

(27) U. S. ex rel. Logan Coal Co. v. Penna. R. Co., 154 Fed. 497, 503, (511).

U. S. ex rel. Pitcairn Co. v. Baltimore & O. R. R. Co., 165 Fed. 113, 126, (495-B), (reversing 154 Fed. 108, 118), (495-A).

(28) See supra §§23, 123, 131.

(29) U. S. ex rel. Coffman v. Norfolk & W. R. Co., 109 Fed. 831, 836, (254).

(30) U. S. ex rel. Logan Coal Co. v. Penna. R. Co., 154 Fed. 497, 498, 503 (511).

Fourth Circuit held that a shipper who did not sell coal to foreign roads was unduly prejudiced by defendant's method of car-distribution, which did not charge such cars against the pro rata share of the mines receiving them.[31]

In Ohio R. Co. *v.* Hocking Val. R. Co.,[32] the Commission had followed the latter principle, and prescribed the same rule for foreign fuel cars as for individual or private cars belonging to shippers, holding that they must be charged against the percentage of the mine using them, even though the foreign roads threatened to cut off the supply unless their cars were excluded from the rating.[33]

176. Same Subject—Individual or Private Cars—Decisions by the Commission.

As to individual or private coal cars owned by shippers, there are a number of cases. In an early decision by the Commission, it was said that where a railroad did not itself own a particular class of cars and leased those owned by some shipper, the cars so leased or used ought properly to be held for the use of all shippers, but if this was impracticable, at least the railroad should see to it that the shipper owning the cars received no advantage in rates thereby.[34] In later decisions the Commission also gave expression to a similar thought, its opinion evidently being that although a shipper might stipulate for the use of his own cars, the railroad was bound to see to it that by having such cars, his competitors, who could not afford them, were none the worse off.[35]

(31) U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 165 Fed. 113; C. C. A. (**495**-B), reversing 154 Fed. 108, 117, (**495**-A).

(32) 12 I. C. C. Rep. 398, (July, 1907), (**526**).
See quotation infra. §176.

(33) See also Royal Coal Co. v. Southern R. Co., 13 I. C. C. Rep. 440, (**630**).
Affirmed on this point in Chicago & A. R. Co. v. I. C. C. Rep., 000 Fed. 000, (**631**-B).

(34) Rice v. Louisville & N. R. Co., 1 I. C. C. Rep., 503, 548 (**42**).

(35) See Scofield v. Lake S. & M. S. R. Co., 2 I. C. C. Rep., 90, 119, (**51**).
Re Relative Tank & Bbl. Rates on Oil, 2 I. C. C. Rep. 365, (**65**).
Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep., 131, 149, (**111**).
Shamberg v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 630, 661, (**127**).
Rice v. Cincinnati, W. & B. R. Co., 5 I. C. C. Rep. 193, 212, (**147**).

In Ohio R. Com. *v.* Hocking Val. R. Co.,[36] the Commission prescribed the following rule for reckoning individual and foreign fuel cars:

"The total of the foreign railway fuel cars, the private cars and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private or leased cars is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered."

177. Same Subject—Federal Decisions on Distribution of Individual Cars.

The Federal Courts have several times passed on the question of the allotment of individual cars. In the Coffman case it was said that if the relator secured individual cars, which he leased or sold on the installment plan to the defendant, such cars must be applied to the accommodation of all shippers alike.[37]

Independent Ref. Ass'n. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 431, 440, (155-A).

Truck Farmers' Ass'n. v. Northeastern R. of S. Carolina, 6 I. C. C. Rep. 295, 316, (191-A).

Re Transportation of Fruit, 11 I. C. C. Rep. 129, 137, (357-B).

(36) 12 I. C. C. Rep. 398, 409, (526).

See also report on coal, p. 49, et seq.

Rail & River Coal Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 86, (670).

(An injunction to restrain the enforcement of the order issued in this case has been denied by the court.)

(37) U. S. ex rel Coffman v. Norfolk & W. R. Co., 109 Fed. 831, 836-7, (254).

See also Chicago & A. R. Co. v. I. C. C. Rep. 000 Fed. 000, 000, (631-B).

In two later cases, in which no opinions were filed, it was held that individual cars need not be charged against the percentages of the mines owning them.[38]

In the Pitcairn Coal Company case it was held that a rule under which shippers were given the exclusive use of their individual cars, in addition to their regular percentage of company cars, worked an unjust discrimination against relators and other independent operators who owned no such cars.[39]

In the Logan Coal Company case, the relator was the owner of individual cars and complained that he was subjected to unjust discrimination by the defendant's method of allotment. Under this method the capacity of the individual and foreign fuel cars placed for loading at a given mine was first deducted from the rated capacity of the mine, and the result used as the rated capacity on which the company cars were distributed. Thus, if at a given time there were only company cars enough to handle one-half of the rated output of the mines in the region, and there were two mines of 200 tons rated capacity each, one of which had individual cars for 100 tons, the mine having no such cars would receive cars for 50 per cent. of 200 tons or 100 tons, and the other mine would get its own cars plus 50 per cent. of 100 tons, or 150 tons in all. It was held that the owner of individual cars had no valid cause of complaint because his cars were not entirely excluded from the calculation.[40] The question as to whether this rule would work an unjust discrimination against one who owned no individual cars was, of course, not decided in this case.

In Royal Coal Co. *v.* Southern R. Co.[41] however, the Commission held that the above method of reckoning company fuel cars worked an unjust discrimination against mines not having fuel contracts and ordered fuel cars to be charged against the mine receiving them just as commercial cars were. Doubtless the same decision would be reached in case of individual cars.

(38) See U. S. ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 154 Fed. 108, 115, (**495**-A).

(39) U. S. ex rel Pitcairn Coal Co. v. Baltimore & O. R. R. Co., 154 Fed. 108, 112-116, (**495**-A); affirmed 165 Fed. 113, (**495**-B).

(40) U. S. ex rel. Logan Coal Co. v. Pennsylvania R. Co., 154 Fed. 497, 498, 502-503, (**511**).

(41) 13 I. C. C. Rep. 440, (**630**).

In Chicago & A. R. Co. *v.* I. C. C.,[42] the Circuit Court of Appeals held that individual cars were to be treated as constituting a part of the carrier's available equipment.

In this case Judge Baker said:

"A charter duty of railroads is to provide cars as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. . . . . In our judgment, therefore, the so-called 'private' cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment."

It has not been definitely held that a shipper would not be unduly prejudiced by allowing an owner of individual cars the use of all his cars, where the number exceeded his rated capacity, although in the Hocking Valley case the Commission made no restriction on the exclusive use of such cars by the owners thereof.[43]

Other cases involving questions of discrimination in car distribution are given in the note.[44]

178. Switch Connections.[45]

A railroad building a switch for or allowing a switch connection to one shipper must do the same for all other shippers similarly situated, and to refuse to do so constitutes unjust discrimination,[46] but this is not true unless the circumstances and condi-

(42) 000 Fed. 000, (631-B).
See also Majestic Coal Co. v. Ill. Cent. R. Co., 162 Fed. 810, (647).

(43) Ohio R. Com. v. Hocking Val. R. Co., 12 I. C. C. Rep. 398 (526).
See, however, Ruttle v. Pere Marquette R. Co., 13 I. C. C. Rep. 179, (595).
See also Royal Coal Co. v. Southern R. Co., 13 I. C. C. Rep. 440, (630).
Traer v. Chicago & A. R. Co., 13 I. C. C. Rep. 451, (631-A).

(44) U. S. v. Baltimore & O. R. Co., 153 Fed. 997, (475).
State ex rel. v. Cincinnati, N. O. & T. P. R. Co., 47 Oh. 130; 7 L. R. A. 319n; 23 N. E. 928.
MacMurray v. Union Pac. R. Co., 13 I. C. C. Rep. 531, (639).

(45) See also infra. Chap. XXII.

(46) Red Rock Fuel Co. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 438, (404).
Interstate Stk. Yds. Co. v. Indianapolis U. R. Co., 99 Fed. 472, (276).

tions in the two cases are substantially similar, and such is not the case where the switch connection desired by complainant is for shipments of live stock, while that allowed to others is for dead freight only.[47] Nor is a railroad bound to put in a switch for one at its own expense, because it allowed others to build them at their expense.[48] It is justified in refusing to allow a switch connection at an inconvenient location,[49] and such refusal is not an unjust discrimination unless it appear that the switch asked for is reasonably practicable to put in, will furnish sufficient business to warrant it, and unless the shipper desiring it agrees to pay the customary part of the expense of construction .[50]

179. Miscellaneous Matters.

It is an undue preference to refuse carload rates to certain commodities while allowing such to other articles of the same class.[51] The same is true of mixed carload rates.[52]

It has been held an undue preference to allow the owners of warehouses situated on a railroad switch to unload from it into their warehouses, while refusing to permit others whose warehouses were situated a short distance from the switch to unload into wagons from cars standing on the switch.[53]

Although after a period of scarcity of cars a railroad is not bound to notify shippers that there is a supply on hand, if it gives notice of this fact to one, it would seem that it should do so to all.[54]

(47) Butchers', etc. Co. v. Louisville & N. R. Co., 67 Fed. 35; 14 C. C. A. Rep. 290; 31 U. S. App. Rep. 252, (194).

(48) Mount Vernon Milling Co. v. Chicago, M. & St. P. R. Co., 7 I. C. C. Rep. 194, (224).

(49) Harp v. Choctaw O. & G. R. Co., 118 Fed. 169, (308-A); 125 Fed. 445; 61 C. C. A. Rep. 405, (308-B).

(50) U. S. v. Baltimore & O. R. Co., 153 Fed. 997, (475).

(51) Brownell v. Columbus & C. M. R. Co., 5 I. C. C. Rep. 638, 650, (167).

(52) Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co., 5 I. C. C. Rep. 663, (169).

Roth v. Texas & P. R. Co., 9 I. C C. Rep. 602, (326).

(53) Miner v. New York, N. H. & H. R. Co., 11 I. C. C. Rep. 422, (403).

(54) Riddle Dean & Co. v. Baltimore & O. R. Co., 1 I. C. C. Rep., 608, 623, (44).

See also Cowan v. Bond, 39 Fed. 54, 58, (80).

A railroad may not allow free storage to some and not to others;[55] and the same is true of free cartage;[56] or of elevation for grain;[57] or of the privilege of milling in transit.[58] Neither may it refuse to allow other shippers to receive goods without first paying the freight and unjustly refuse this to complainant.[59] It may not refuse transportation for certain commodities while transporting others of a similar kind.[60] Nor, would it seem, may the carrier unreasonably discriminate against a package of a certain kind.[61]

It is not an undue preference to refuse to furnish the same terminal facilities for every kind of traffic;[62] nor to guaranty to a theatrical troup travelling on a party rate that it will arrive at a certain time, while giving no such guaranty to individuals.[63]

To allow a through route to one mine and not to another in the same region is an unjust discrimination.[64]

It has been held that where first class tickets are sold to colored

(55) American Warehousemen's Ass'n. v. Illinois C. R. Co., 7 I. C. C. Rep. 556, 563, 564 (**247**).

(56) I. C. C. Rep. v. Detroit G. H. & M. R. Co., 167 U. S. 633; 17 Sup. Ct. Rep. 936, (**100-D**), (semble).

(57) Re-Allowances to Elevators, 12 I. C. C. Rep. 85, (**351-B**).

(58) St. Louis, H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 101, (**384-A**).

(59) Phelps v. Texas & Pac. R. Co., 6 I. C. C. Rep. 36, (**171**).

(60) Paxton Tie Co. v. Detroit S. R. Co., 10 I. C. C. Rep. 422, (**363**).
See, however, supra §§127-130 as to this decision.

(61) Rhode I. Egg & Butter Co. v. Lake Shore & M. S. R. Co., 6 I. C. C. Rep., 176, 185-6, (**182**).
But see Philadelphia Trades League v. Phila., W. & B. R. Co., 8 I. C. C. Rep. 368, (**274**).
And supra §63.

(62) Palmers Hay, etc. ex. v. Penna. R. Co., 9 I. C. C. Rep., 61, 66, (**293**).

(63) Foster v. Cleveland C. C. & St. L. R. Co., 56 Fed. 434 (1893).

(64) Cardiff Coal Co. v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 460, 468, (**632**).

persons, accommodations must be allowed them equal to the facilities furnished to white passengers.[65]

(65) Councill v. Western & Atl. R. Co., 1 I. C. C. Rep. 339, (33).
Heard v. Georgia R. Co., 1 I. C. C. Rep. 428, (37).
Heard v. Georgia R. Co., 3 I. C. C. Rep. 111, (79).
Edwards v. Nashville, C. & St. L. R. Co., 12 I. C. C. Rep. 247, (506).
And compare McGuinn v. Forbes, 37 Fed. 639, (1889).
Houck v. Southern Pac. R. Co., 38 Fed. 226, (1888).
As to the jurisdiction of the Commission in such cases see supra, §§129-130.

CHAPTER XVI.

DISCRIMINATIONS AND PREFERENCES—PREFERENCES AMONG LOCALITIES.

180. Reasons for and Purpose of the Prohibition of Preferences among Localities.
181. Scope of the Prohibition.
182. Same Subject — Distinction between Problem under Sections 3, 4 and 1.
183. Questions of Reasonableness of Preferences under Section 3, or of Similarity of Circumstances under Section 4, are Questions of Fact.
184. General Attitude of the Commission and the Courts in Treating Questions of Preference among Localities—Burden of Proof.
185. Division of a Through Rate not the Standard of What Local Rates should be.
186. Same Subject—Criticism of Dicta in Certain Federal Decisions.
187. Same Subject — Inland Rates on Export and Import Traffic.
188. Legality of Proportional and Reconsignment Rates — Proportional Rates.
189. Same Subject—Reconsignment Rates.
190. Same Subject—Conclusion from the Cases.
191. Undue Preferences between Localities not Confined to Rates but Include Facilities.

180. Reasons for and Purpose of the Prohibition of Preferences among Localities.

Prior to 1887 there had grown up, particularly in the South, a system of rate-making, called the Basing Point, or Trade-Centre System, by which certain large towns were given particularly low rates, and the rates to surrounding points were made by combining the rate to the "basing-point" with the regular local rate therefrom to the outlying town or village in question. This system was followed both on the near and on the far side of the "Trade-Centre" until a point was reached where a lower combination was possible on some other basing point, when the latter combination would be used.

The "Trade-Centres" were usually points where two or more lines centred and the low rates were mainly the result of the competition of such roads, but their choice was also to a certain extent arbitrary on the part of the railroads, the result of their desire to centre the jobbing traffic at as few points as possible. It

could thus be handled more cheaply than when scattered out among a number of small suburban towns.

By reason of the advantage in rates thus obtained, jobbers at the basing point could sell their goods in the surrounding territory at great advantage over those at outlying points, and this greatly stimulated the growth and prosperity of the trade centres at the expense of their less fortunate neighbors, and gave rise to many complaints on the part of the latter.

The second Section of the English Railway and Canal Traffic Act of 1854, on which Section 3 of our Act was modeled,[1] forbade the giving of "any undue or unreasonable preference or advantage to any particular person or company, or any particular description of traffic, in any respect whatsoever," but did not expressly forbid the preference of one locality over another.

The insertion in our Section 3 of the prohibition against the undue preference of any locality, as well as the whole of Section 4,[2]—the long and short haul clause,—was an attempt to protect small outlying points from the alleged abuses connected with the "trade-centre" system.

181. Scope of the Prohibition.

Neither Section 3 nor Section 4, however, forbids every preference of one locality over another, Section 3 making unlawful only such preferences and advantages as are "undue and unreasonable," and Section 4 forbidding a greater charge for a shorter distance only where the two hauls are "under substantially similar circumstances and conditions." Mere disparity in rates is not forbidden. Where the preference, or the greater charge for the less distance results not from the unreasonable or arbitrary action of the carrier, but from the influence of compelling conditions beyond its control, it is not unlawful. As said by Commissioner Clements in Wilmington Tar. Assn. *v.* Cincinnati P. & V. R. Co.:[3]

(1) Texas and Pac. R. Co. v. I. C. C., 162 U. S. 197, 222; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

Trammell v. Clyde S. S. Co., 5 I. C. C. Rep. 324, 372-381, (154-A).

And supra, Chap. XII, § 138, n.5.

(2) Up to 1885, 17 States had adopted some sort of a long and short haul statute. These are summarized in the 4th Annual Report of the Commission, (4 I. C. C. Rep. 375-380).

(3) 9 I. C. C. Rep. 118, 157, (298-A).

"Preferences existing under relative rates to competing localities must be shown to result from the wrongful action of the carrier or carriers before it or they can be required to readjust the rates in question."

In delivering the opinion of the Court in East Tenn. V. & G. R. Co. v. I. C. C.,[4] Mr. Justice White said:

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

In order unduly to prefer one locality over another, the defendant road must control the rate and traffic, both to the preferred point and to that complaining. There cannot be an undue preference where the points are not both reached by the same line.[5]

182. Same Subject—Distinction between Problem under Sections 3, 4 and 1.

The principal controversies which have arisen with regard to preferences among localities or greater charges for a shorter haul, relate to the question as to what is sufficient in a given case to make the circumstances and conditions dissimilar, or to render the preference reasonable and not undue. Section 4, as interpreted by our courts, probably adds nothing to Section 3, any circumstance of "substantial dissimilarity" under the one being a valid justification of a preference under the other. In McClelen *v.* Southern Ry. Co.,[6] Commissioner Yeomans said:

"The exaction without lawful excuse, of a greater compensation in the aggregate for the shorter than for the longer haul over the same line in the same direction, the shorter being included in the longer, which is forbidden by Section 4 of the Act to Regulate Commerce, is only a form of unjust discrimination, or

(4) 181 U. S. 1, 18; 21 Sup. Ct. 516; 45 L. Ed. 719, (162-D).

(5) Central Yel. P. Asso. v. Vicksburg, S. & P. Co., 10 I. C. C. Rep. 193, 201, (344).
Eau Claire Bd. of Tr. v. Chicago, M. & St. P. R. Co., 5 I. C. C. Rep. 264, 294, (151).
But see p. 295 of the latter case.

(6) 6 I. C. C. Rep. 588, 599, (208-A).

undue preference, to which, it seems, Congress desired to call particular attention because of its prevalence in certain sections of the country." [7]

Section 3 of course covers many cases of undue preferences among localities which do not come within the rule of Section 4.[8] Even where the difference in conditions would justify a somewhat greater charge for the less distance, a difference in the rates actually charged, greater than these conditions warrant, will result in an undue preference. As to whether the latter case is also a violation of Section 4 there would appear to be some doubt, but the better opinion would seem to be that it is not.[9]

Similarly, a rate may be reasonable *per se* under Section 1 but may create an undue preference of some competing point which has an unreasonably low rate.[10] So, also, the same charge for the greater distance on the same line, although not a violation of Section 4, may constitute an undue preference of the more distant point or be cogent evidence that the rate to the nearer locality is unreasonable.[11]

(7) See also East Tenn., V. & G. R. Co. v. I. C. C., 181 U. S. 1, 19; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D).

I. C. C. v. Nashville C. & St. L. R. Co., 120 Fed. 934, (**281**-B).

I. C. C. v. Southern R. Co., 117 Fed. 741; 122 Fed. 800, (**277**-C).

Bovaird Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 56, 66, (**576**).

(8) Such as rates to a more distant point higher by an unreasonable amount than those to a less distant; or discriminating rates on two parallel lines controlled by the same railroad.

See, for example, Farmington Board of Trade v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep. 215, (**29**).

Raymond v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep. 230, (**30**).

Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 140-141, (**111**).

(9) See Marten v. Louisville & N. R. Co., 9 I. C. C. Rep. 581, 601, (**325**).

Gardner v. Southern R. Co., 10 I. C. C. Rep. 342, 348, (**355**).

East Tenn. V. & G. R. Co. v. I. C. C., 181 U. S. 1, 22; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D), infra, §203.

(10) Lynchburg Bd. of Tr. v. Old Dom. S. S. Co., 6 I. C. C. Rep. 632, 645, (**211**).

(11) See James & Mayer Co. v. Cin. N. O. & T. P. Ry. Co., 4 I. C. C. Rep. 744, 751, (**132**-A).

Milk Prod. Asso. v. Delaware, L. & N. R. Co., 7 I. C. C. Rep. 92, 163, (**220**).

Cary v. Eureka Sp. R. Co., 7 I. C. C. Rep. 286, 310, (**235**), and cases, supra, §§59-60, and infra, §203.

183. Questions of Reasonableness of Preferences under Section 3, or of Similarity of Circumstances under Section 4, are Questions of Fact.

Questions arising under Sections 3 and 4 are questions of fact. In I. C. C. *v.* Alabama Mid. R. Co.,[12] Mr. Justice Shiras, in delivering the opinion of the Court, said:

"As the third section of the Act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. Denaby Main Colliery Co. *v.* Manchester &c. Railway Co. 3 Railway & Canal Traffic Cases, 426; Phipps *v.* London & Northwestern Railway, (1892) 2 Q. B. D. 229; Cincinnati, N. O. & Tex. Pac. Ry. *v.* Interstate C. C. 162 U. S. 184, 194; Texas & Pac. Railway *v.* I. C. C., 162 U. S. 197, 235." [13]

184. General Attitude of the Commission and the Courts in Treating Questions of Preferences among Localities—Burden of Proof.

In deciding questions of discrimination and preference the Commission and the Courts will treat the subject broadly and practically, and not by a process of mathematical calculation.[14] The

(12) 168 U. S. 144, 170; 42 L. Ed. 414; 18 Sup. Ct. 45, (170-D). See also infra, §332.

(13) See also Howell v. New York L. E. & W. R. Co., 2 I. C. C. Rep. 272, 298, (59).
Phillips Co. v. Louisville & N. R. Co., 8 I. C. C. Rep. 93, 108, (259).
Danville v. Southern R. Co., 8 I. C. C. Rep. 409, 426, (277-A).

(14) Boston Ch. of Com. v. Lake Shore & M. S. R. Co., 1 I. C. C. Rep. 436, 459, (38).
I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 419, 421, (156-B).

interest of the carriers, the shippers, the place of consignment and the place of shipment are all to be taken into consideration.[15]

On a number of occasions, the Commission has said that the burden of showing a discrimination or preference is on the complainant, but that such being shown, or a greater charge for a less distance on the same line appearing, the burden is shifted to the defendant to show that it is not unjust or undue.[16] When the carrier has in its turn shown conditions of substantial dissimilarity at the two points, it has been said that the burden again rests on the complainants to prove that these conditions do not in fact control the rate relation complained of.[17]

In spite, however, of these dicta, it would seem that as a matter of fact the presumption as to the reasonableness of a rate fixed by the carrier extends not only to its reasonableness *per se,* but also to its relative reasonableness, as compared with other rates. Both the Commission and the Courts have always refused to dis-

(15) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 233; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

(16) Spartanburg Bd. of Tr. v. Richmond & D. R. Co., 2 I. C. C. Rep. 304, 307, (61).

Thurber v. New York Cent. R. Co., 3 I. C. C. Rep. 473, 509, (92).

James v. Canadian Pac. R. Co., 5 I. C. C. Rep. 612, 625, (165).

Troy Bd. of Tr. v. Alabama Md. R. Co., 6 I. C. C. Rep. 1, 15, (170-A).

See also St. Bernardino Bd. of Tr. v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 104, 110-111, (110-A).

In the case last cited it was held that a complainant under Section 4 need not allege substantial similarity of conditions at the long and short distance points; but see King v. New York, N. H. & H. R. Co., 4 I. C. C. Rep. 251, 260, (116).

Dallas Ft. Bur. v. Tex. & P. R. Co., 8 I. C. C. Rep. 33, 45, (256).

Phillips & Co. v. Louisville & N. R. Co., 8 I. C. C. Rep. 93, 108, (259).

Re St. Louis & S. F. R. Co., 8 I. C. C. Rep. 290, 301, (267).

Danville v. Southern R. Co., 8 I. C. C. Rep. 409, 426, (277-A).

Richmond El. Co. v. Pere M. R. Co., 10 I. C. C. Rep. 629, 636-7; (372).

Missouri Pac. R. Co. v. Texas & P. R. Co., 31 Fed. 862 (1887).

See also supra, §§85-87, 92.

(17) See New York P. Ex. v. Baltimore & O. R. Co., 7 I. C. C. Rep. 612, 660-661, (252).

Spiegle v. Chesapeake & O. R. Co., 11 I. C. C. Rep. 367, (400).

Pecos Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 173, 178, (594).

turb a rate on a mere comparison of tariff sheets, and without proof of the conditions at the locality of complaint or at the points whose rates are used as a basis of comparison.[18]

185. Division of a Through Rate not the Standard of What Local Rates should be.

Questions of undue preference of localities, or of violation of the long and short haul clause, cannot be tested by a comparison of a carrier's local rate between two given points with its share of a joint through rate applicable to the haul between the same localities on freight coming from more distant points under a through routing agreement in connection with another carrier. The rates used as a basis must be the entire and total rates from the point of origin through to the point of destination.

During the first few years after the passage of the Act, a number of proceedings were instituted under Section 4 on the theory that this Section was violated by a carrier's acceptance of a greater sum as its local charge between two points than it accepted as its proportion of a through rate for a haul between one of these points and another point more distant on the same line in a through shipment made in connection with another carrier. It was held that this did not constitute a violation of the Act, local rates not being the measure of what a railroad should accept as its division of through rates.[19]

(18) See cases, supra, §92.

(19) Detroit Bd. of Tr. v. Grand Tr. R. Co., 2 I. C. C. Rep. 315, 320-321, (62).

Rice v. Western N. Y. & P. R. Co., 2 I. C. C. Rep. 339, 395, (67).

Milwaukee Ch. of Com. v. Flint & P. M. R. Co., 2 I. C. C. Rep. 553, 570-571, (71).

Lippman v. Illinois Cent. R. Co., 2 I. C. C. Rep. 584, 585, (73).

Poughkeepsie Iron Co. v. New York Cent. R. Co., 4 I. C. C. Rep. 195, 207, (113).

Coxe Bros. v. Lehigh Val. R. Co., 4 I. C. C. Rep. 535, 563, (124-A).

Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912; 10 U. S. App. 430; 3 C. C. A. 347, (138-C); (reversing 47 Fed. 290, and 48 Fed. 49).

Tozer v. U. S., 52 Fed. 917, (70-D).

U. S. v. Mellen, 53 Fed. 229, (158).

Parsons v. Chicago & N. W. Ry. Co., 63 Fed. 903; 11 C. C. A. 489; 27 U. S App. 394, (188-A); 167 U. S. 447; 42 L. Ed. 232; 17 Sup. Ct. 887, (188-B).

Similarly, it has always been understood that it is not a violation of the Act to accept different sums as divisions of through rates for the same haul on freight coming through from different points of origin or going on to different destinations by connecting lines.[20]

186. Same Subject—Criticism of Dicta in Certain Federal Decisions.

Certain of the Circuit Courts, however, went so far as to hold that a through rate made by two or more carriers was over a different "line" from each of the local rates for the hauls making up the total distance, and that even if the total through rate was less than one of the locals for part of the distance, this could not be a violation of Section 3 or 4.[21] Under later decisions, however, this would seem clearly not to be the law.[22]

Although the proportion of a through rate is not a proper subject of comparison with a local one, joint through rates may be compared with the rates of one of the lines party to them, and a road is bound to observe the provisions of the Act not only in reference to such rates as it makes over its own line, but also as to rates in which it participates, as a connecting carrier, with other railroads.[23] The point established by the decisions above referred

(20) Boston Ch. of Com. v. Lake S. & M. S. R. Co., 1 I. C. C. Rep. 436, (38).

See also Kemble v. Lake S. & M. S. R. Co., 5 I. C. C. Rep. 166, 188, (146).

Allen v. Oregon R. & N. Co., 98 Fed. 16; 106 Fed. 265, (270).

Burnham Co. v. Chicago, R. I. & P. R. Co., 14 I. C. C. Rep. 299, 310, (697).

See also supra, §§97-99.

(21) Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912; 10 U. S. App. 430; 3 C. C. A. 347, (138-C).

U. S. v. Mellen, 53 Fed. 229, (158).

See also King v. New York, N. H. & H. R. Co., 4 I. C. C. Rep. 251, 262, (116).

(22) Cincinnati N. O. & T. P. Co. v. I. C. C., 162 U. S. 184, 192-193; 16 Sup. Ct. 700; 40 L. Ed. 935, (132-C), (reversing 56 Fed. 925).

(23) See Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 474-478, (200).

Also Vermont St. Grange v. Boston & L. R. Co., 1 I. C. C. Rep. 158, 174-176, (24).

to is that the comparison must be not between or with parts of rates, but between total and entire rates between points of origin and destination.

187. Same Subject—Inland Rates on Export and Import Traffic.

A question of a similar nature arose in a number of cases concerning the legality of a less inland rate on exported or imported traffic than the regular domestic rates between the same points. Although in an early case the Commission intimated that a less charge on exported goods was proper,[24] in two later cases it held that the regular domestic rates must be charged, both on exported[25] and on imported[26] goods. The latter of these cases came before the Supreme Court in the Import Rate Case,[27] where the decision of the Commission was reversed and it was held that the competition of ocean carriers and of other carriers and markets was a sufficient circumstance of dissimilarity between imported and domestic goods to warrant a less charge for the transportation of the former between the same points. In subsequent cases the Commission of course followed this ruling.[28] The Com-

(24) Re Export Trade of Boston, 1 I. C. C. Rep. 24, (7).

(25) New York Pr. Ex. v. New York Cent. & H. R. R. Co., 3 I. C. C. Rep. 137, (82).

See also New Orleans Cot. Ex. v. Louisville, N. O. & T. R. Co., 4 I. C. C. Rep. 694, (1891).

(26) New York Bd. of Tr. v. Penna. R. Co., 4 I. C. C. Rep. 447, (122-A).

It is somewhat difficult to follow the Commission's reasoning in holding that although the only species of competition among carriers which justified a preference or an exception to the long and short haul provision was the competition of carriers not subject to the Act, and although the continuation of the shipment by carriers subject to the Act justified a lower proportional rate, trans-shipment by other carriers did not justify such a rate.

(27) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

See also supra, §146.

(28) New York Prod. Ex. v. Baltimore & O. R. Co., 7 I. C. C. Rep. 612, 660, (252).

Kemble v. Boston & A. R. Co., 8 I. C. C. Rep. 110, 113, (260).

Re Export & Domestic Rates, 8 I. C. C. Rep. 214, 251-256, (265).

Ullman v. Adams Exp. Co., 14 I. C. C. Rep. 340, (701-A).

In the case last cited, the Commission said that although inland rates

mission has still held, however, that a railroad may not charge less than its regular local rate on freight about to be immediately transshipped by a railroad with which it does not make a joint through rate,[29] or by some carrier not subject to the Act other than a steamship bound for a foreign port.[30]

Although in the Import Rate Case the Court relied principally on ocean competition to justify the disparity in rates, the real gist of the matter was that the railroads were forced to give a low rate to get the traffic. This was true in New York, N. H. & H. R. *v.* Platt,[31] and in Cary *v.* Eureka Springs R. Co.[32] above cited, as well as in the cases of exported and imported goods. In cases where the real reason for the preference is not that the carriers are forced by outside circumstances to allow the low rate in the one case and not in the other, but where they do it as a result of an agreement among themselves,[33] or to further some outside enterprise in which they are interested,[34] a different question is, of course, presented.[35] It is submitted that in view of the Import Rate case, the Cary and Platt cases were wrongly decided.

on exported goods might properly be lower than the domestic rates, the lower export rates must be extended to all persons alike and the carriers were bound to make certain that traffic enjoying them was actually exported.

See also Re Proposed Adv. in Frt. Rates, 9 I. C. C. Rep, 382, 388, (313).

(29) New York, N. H. & H. R. Co. v. Platt, 7 I. C. C. Rep. 323, (236).

See also Re Application of Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 593, 598, (248).

But cf. Kehoe v. Evansville & T. H. R. Co., 11 I. C. C. Rep. 172, 176, (392).

(30) Cary v. Eureka Spgs. R. Co., 7 I. C. C. Rep. 286, 310-11, (235). Wylie v. Northern Pac. R. Co., 11 I. C. C. Rep. 145, (388).

(31) 7 I. C. C. Rep. 323, (236).

(32) 7 I. C. C. Rep. 286, (235).

(33) City Gas Co. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 371, (401).

(34) Wylie v. Northern Pac. R. Co., 11 I. C. C. Rep. 145, (388).

(35) Compare also Bigbee Packet Co. v. Mobile & O. R. Co., 60 Fed. 545, (177), where it was held that the fact that cotton had been brought to Mobile from an outside point by a water carrier and was immediately reshipped by defendant's line, did not justify defendant in charging a high-

188. Legality of Proportional and Reconsignment Rates—Proportional Rates.

Since the decision in the Import Rate Case, the Commission has never discussed in a satisfactory manner the question as to how far a carrier is justified in allowing less than its regular local rates on traffic which has either come from or is destined to points beyond those between which the rate is made. This question may arise in a number of different forms. The transportation may be either:

(A) Part of a through haul at a joint through rate;

(B) Part of a through haul broken by a temporary stop;

(C) Part of a continuous journey in connection with

(a) a carrier subject to the Act but with whom the carrier making the charge in question has no through rate agreement, or

(b) with a carrier not subject to the Act;

(D) Not part of a continuous haul but covering traffic previously shipped in or to be shipped out, either over the line of the same road or over another line.

The Commission had always held that a part of a through joint rate applicable between two points should normally be less than the local rate between the same points.[36] It has also decided in a number of cases that it is proper to interrupt a through shipment for some temporary purpose and resume the journey at the balance of the through rate, and that rates providing for the milling of grain,[37] the floating of cotton,[38] the sawing of logs,[39]

er rate for its transportation, in pursuance of an agreement between defendant and another railroad, than that charged on other cotton which had not come to Mobile by water lines.

(36) See supra, §97.

(37) Diamond Mills Co. v. Boston & M. R. Co., 9 I. C. C. Rep. 311, 316, (310).

See also Re Iowa Co., 1 I. C. C. Rep. 17, (4).

Re St. Louis Millers' Asso., 1 I. C. C. Rep. 20, (5).

Minneapolis Ch. of Com. v. Great Nor., 5 I. C. C. Rep. 571, 591, (163).

Omaha Cl. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 677, (212).

Listman Co. v. Chicago, M. & St. P. R. Co., 8 I. C. C. Rep. 47, (257).

Koch v. Penna. R. Co., 10 I. C. C. Rep. 675, (377).

or the feeding of cattle[40] in transit are lawful through rates, whether over one line or over several under a joint agreement.[41] In the other instances referred to in § 187, however, the decisions of the Commission would seem difficult to reconcile, either with one another, or with the Import Rate Case.[42]

Where the freight has come from or is going on by the line of another carrier in a continuous shipment, the rate in question is called a proportional rate. Such rates have on a number of occasions been involved in cases before the Commission, without their legality being questioned,[43] but in none of these cases did the con-

St. Louis H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 101, (384-A).

Quimby v. Maine Cent. R. Co., 13 I. C. C. Rep. 246, (605).

Compare also Hecker Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 356, (702).

(38) Re Cotton Rates by K. C. M. & B. R. Co., 8 I. C. C. Rep. 121, (261).

Muskogee Com. Cl. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 312, (514).

(39) Central Yel. P. Asso. v. Vicksburg, S. & P. R. Co., 10 I. C. C. Rep. 193, 214, (344).

(40) Corn Belt Asso. v. Chicago B. & Q. R. Co., 14 I. C. C. Rep. 376, (704).

(41) Where, as in these cases, the article is uniform, it is not necessary that the flour, cotton, or boards reshipped shall be made from the identical wheat, cotton or logs shipped in, but where the article is not uniform, as where hogs of different kinds are stopped for sorting, the Commission has refused to sanction reshipments at the balance of the through rate.

See Shiel v. Illinois Cent. R. Co., 12 I. C. C. Rep. 210, 215, (498).

Cf. Chicago Bd. of Tr. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, 190, (112).

Admin. Rul. No. 85.

See, however, Re Mobile & O. R. Co., 9 I. C. C. Rep. 373, 380, 381, (312).

(42) Texas & Pac. R. Co., v. I. C. C., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D), (supra, §§146, 187).

(43) Hilton Lumber Co. v. Wilmington & W. R. Co., 9 I. C. C. Rep. 17, 38, (291).

Kehoe v. Evansville & T. H. R. Co., 11 I. C. C. Rep. 172, 179, (392).

Re Through Routes & Rates, 12 I. C. C. Rep. 163, 172, (489).

North Bros. v. St. Louis & S. F. Co., 13 I. C. C. Rep. 152, (1908).

See also Freeman v. Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 202, 217, (225).

necting carrier object. In the only case where such carrier did object the Commission held that the proportional rate was illegal.[44] It is difficult to see how the attitude of the connecting carrier could be material, and this decision is believed to be unsound. The Import Rate Case[45] involved the same question and it was there held that the fact that the freight had come from other points by carriers not subject to the Act, giving rise to market competition, justified inland proportional rates less than the regular domestic charges.

189. Same Subject—Reconsignment Rates.

Where the rate in question is not a rate for a part of a continuous journey but applies to traffic which has previously paid a local rate in, we have the ordinary reconsignment rate. These rates cannot, in the great majority of cases, be explained as parts of through rates, in view of a recent decision by the Supreme Court.[46] Where an article is shipped to a given point and consignee, on its arrival there the shipment ends. If it be subsequently reshipped, this is a new journey, even though the shipper all along contemplated a reshipment.[47] In an early case the Commission held that where the first shipment was thus completed the carrier might not take up the freight again at the balance of the through rate.[48] By a dictum in a later case, however, the practice so condemned was apparently approved,[49] and in recent de-

(44) New York, N. H. & H. R. Co. v. Platt, 7 I. C. C. Rep. 323, (236).

(45) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D), (supra, §§146, 187).

(46) Gulf C. & S. F. R. Co. v. Texas, 204 U. S. 403, (453*).
See supra, §34.

(47) Supra, §45, n. 10.

(48) Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co., 3 I. C. C. Rep. 450, (90).
See also Re Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 240, (231).
And cf. Omaha Com. Cl. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 677, (212).

(49) Central Yel. P. Asso. v. Vicksburg S. & P. R. Co., 10 I. C. C. Rep. 193, 213, 214, (344).

cisions the Commission has frequently commented on [50] and issued administrative rulings [51] with regard to reconsignment rates, without any seeming disapproval, except to state that it would not permit the substitution of tonnage.[52] In these cases, however no one was objecting to the reconsignment rate, and the Commission has never given its sanction to such rates where objected to. On the other hand in a number of cases it has said that the mere fact the freight had already made a local journey and paid a local rate was not a valid reason for allowing such freight a rate lower than the regular rate applicable to freight originating at the point of reshipment.[53]

(50) St. Louis H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 101, (384-A).

St. Louis H. & G. Co. v. Illinois Cent. R. Co., 11 I. C. C. Rep. 486, (410).

St. Louis Mer. Ex. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 11, 105, 108, (562).

Kehoe v. Illinois Cent. R. Co., 14 I. C. C. Rep. 541, (723).

(51) Admin. Rul. Nos. 72 and 85, (see also No. 57).

(52) Admin. Rul. No. 85.

Shiel v. Illinois Cent. R. Co., 12 I. C. C. Rep. 210, 215, (498).

And cf. Chicago Bd. T. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, 190, (112).

And Re Mobile & O. R. Co., 9 I. C. C. Rep. 373, 380, 381, (312).

(53) James v. East T., V. & G. R. Co., 3 I. C. C. Rep. 225, 234, (84).

Chicago Bd. of Tr. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, 190, (112).

Re Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 240, (231).

Re Mobile & O. R. Co., 9 I. C. C. Rep. 373, (312).

Cannon Falls Co. v. Chicago G. W. R. Co., 10 I. C. C. Rep. 650, 653, (374).

Bigbee Packet Co. v. Mobile & O. R. Co., 60 Fed. 545, (177).

Cases of proportional rates applicable to traffic going on by continuous shipment are always cases involving preferences among localities, the point of origin against the point of transshipment; on the other hand, where a lower rate is claimed or allowed because the freight has already paid an independent local rate, the contest is generally one between different shippers at the point of transshipment. In the latter case competition would not justify the discrimination, even if shown to be effective. It is difficult to conceive a case where competition would necessitate a special reconsignment rate.

190. Same Subject—Conclusion from the Cases.

As above stated, it is not possible to reconcile all these statements and dicta, but the law would appear to be briefly as follows:

Under the Import Rate Case, a carrier, when compelled to do so by the stress of market competition,[54] may allow a less rate on articles coming from or destined to outside points, than the rates on commodities originating at or destined to a point on its own line. It is immaterial in such cases whether the connecting carrier is subject to the Act or is not subject thereto, or whether such carrier assents to the rate in dispute or refuses to sanction it. Also, although the fact that freight has already paid a local rate is not sufficient ground for compelling the carrier to allow it a special reconsignment rate, yet if the carrier chooses so to do, the rate will probably not be interfered with by the Commission on its own motion, even where the continuity of the haul has been broken. If, however, in such a case it appears that some one is prejudiced by the reconsignment privilege, the Commission would probably condemn it. In other words, proportional rates, applicable to portions of continuous hauls are legal, but reconsignment rates, if objected to, are perhaps not.

191. Undue Preferences between Localities not Confined to Rates but Include Facilities.

Preferences between localities are not confined to those in respect to rates proper; to allow unequal facilities to localities similarly situated is also forbidden.[55] The circumstances and conditions in the two cases must be similar, however, and certain privileges, such as superior terminal facilities, may be allowed a large city which are denied to a smaller one.[56] Free drayage at one point and not at another may amount to an illegal preference of

(54) Where the lower rate complained of was not forced by commercial competition, but was the result of an agreement among the carriers or to further some outside enterprise in which they were interested, this principle would not apply.
Supra, §187, n.33, 34 and 35.

(55) Hawkins v. Lake S. & M. S. R. Co., et al., 9 I. C. C. Rep. 212, 214, (303).

(56) Michie v. New York, N. H. & H. R. Co., 151 Fed. 694, 696, (455).

the former,[57] and the same may be true of unequal demurrage charges at two points,[58] or of payment by the carrier of lighterage charges at one point and not at another,[59] or of the allowance of through routes and rates,[60] or carload rates,[61] or of milling-in-transit privileges,[62] or of any other facilities[63] to one town and not to another similarly situated.

(57) Stone v. Detroit G. H. & M. R. Co., 3 I. C. C. Rep. 613, (100-A).

I. C. C. v. Detroit G. H. & M. R. Co., 167 U. S. 633, 644; 42 L. Ed. 306; 17 Sup. Ct. 986, (100-D).

Cf. Hezel Co. v. St. Louis A. & T. H. R. Co., 5 I. C. C. Rep. 57, (140).

(58) Penna. Millers' Asso. v. Phila. & R. R. Co., 8 I. C. C. Rep. 531, 552, (283).

(59) Toledo Pr. Ex. v. Lake S. & M. S. R. Co., 5 I. C. C. Rep. 166, (146).

Cf. Rawson v. New N. & M. V. R. Co., 3 I. C. C. Rep. 266, (1889).

(60) Harwell v. Columbus & W. R. Co., 1 I. C. C. Rep. 236, (31).

Indep. Ref. Asso. v. Penna. R. Co., 6 I. C. C. Rep. 52, 59, (155-B).

Johnson v. Chicago & St. P. M. & O. R. Co., 9 I. C. C. Rep. 221, (305).

Cf. Wichita v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 534, (322).

Cannon Falls v. Chicago G. W. R. Co., 10 I. C. C. Rep. 650, 659-60, (374).

(61) Spokane Mer. Un. v. Union Pac. R. Co., 5 I. C. C. Rep. 478, 496, (157).

(62) Omaha Com. Cl. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 677, (212).

Koch v. Penna. R. Co., 10 I. C. C. Rep. 675, (377).

Cf. Hecker Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 356, (702).

Corn Belt Asso. v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 376, (704).

See also St. Louis Traffic Bur. v. Chicago B. & Q. R. Co., 14 I. C. C. Rep. 317, (698).

In the case last cited it would appear from the opinion that the preference of St. Louis shippers over those at Omaha by allowance of elevator charges at the latter might well have been held to have been justified by competition.

(63) Hill v. Missouri, K. & T. R. Co., 6 I. C. C. Rep. 601, 617-8, (210).

Sprigg v. Baltimore & O. R. Co., 8 I. C. C. Rep. 443, 451-2, 475-8, (279).

Hawkins v. Lake Shore & M. S. R. Co., 9 I. C. C. Rep. 207, 212, (303).

Cincinnati Ch. of Com. v. Baltimore & O. S. W. R. Co., 10 I. C. C. Rep. 378, (358).

St. Louis H. & G. Co. v. Mobile & O. R. Co., 11 I. C. C. Rep. 90, 102, (384-A).

Alleged discriminations against the following localities have been considered by the Commission:

Anthony—Anthony Grocery Co. v. Atchison, T. & S. F. Ry. Co. et al., 13 I. C. C. Rep. 605, (650).

Atchison—Atchison, Kas. City Councils v. Missouri Pac. Ry. Co. et al., 12 I. C. C. Rep. 112, (477).

Augusta—Rice v. Georgia Ry. Co., 14 I. C. C. Rep. 75, (668).

Boston—Boston Chamber of Commerce v. Lake Shore & M. S., N. Y. C. & H. R. Ry. Co. and B. & O. Ry. Co., 1 I. C. C. Rep. 436, (38).

Charlotte—Charlotte Shippers' Asso. v. Southern Ry. Co. et al., 11 I. C. C. Rep. 108, (386).

Chattanooga—Chattanooga Chamber of Commerce v. Southern Ry. Co. et al., 10 I. C. C. Rep. 111, (341).

Cincinnati—Cincinnati Fr. Bur. v. Cincinnati, N. O. & T. P. Ry. Co. et al., 7 I. C. C. Rep. 180, (221-A).

Cordele—Hill & Bro. v. Nashville, C. & St. L. Ry. Co. et al., 6 I. C. C. Rep. 343, (197).

Danville—Crews et al. v. Richmond & Danville Ry. Co., 1 I. C. C. Rep. 401, (36).

Danville v. Southern Ry. Co. et al., 8 I. C. C. Rep. 409, (277-A).

Gardner & Clark v. Southern Ry. Co., 10 I. C. C. Rep. 342, (355).

Dawson—Dawson City Board of Trade v. Central of Georgia Ry. Co. et al., 8 I. C. C. Rep. 142, (262).

Denver—Kindel v. Atchison, T. & S. F. Ry. Co. et al., 8 I. C. C. Rep. 608, (288).

Detroit—Detroit Board of Trade et al. v. Grand Trunk Ry. Co. et al., 2 I. C. C. Rep. 315, (62).

East St. Louis—Hezel Milling Co. v. St. Louis, A. & T. H. Ry. Co. et al., 5 I. C. C. Rep. 57, (140).

Eau Claire—Eau Claire Board of Trade v. Chicago, M. & St. P. Ry. Co. et al., 5 I. C. C. Rep. 264, (151).

Gallatin—Flint Co. v. Grand R. & I. Ry. Co. et al., 14 I. C. C. Rep. 520, (717).

Griffin—Griffin Grocery Co. v. Southern Ry. Co., 11 I. C. C. Rep. 522, (415).

Helena—Davenport Bros. & Co. v. Southern Ry. Co. et al., 11 I. C. C. Rep. 650, (435).

Independence—Bovaird Supply Co. v. Atchison, T. & S. F. Ry. Co. et al., 13 I. C. C. Rep. 56, (576).

Indianapolis—Bates v. Penn. Ry. Co. & Penn. Co., 3 I. C. C. Rep. 435, (89-A).

Johnson City—Gump v. Baltimore & O. Ry. Co., 14 I. C. C. Rep. 98, (671).

Kearney—Gustin v. Illinois Cent. Ry. Co. et al., 7 I. C. C. Rep. 376, (238).

Kramer—Hamilton & Brown v. Chattanooga, R. & C. Ry. Co. et al., 4 I. C. C. Rep. 686, (129).

La Crosse—La Crosse Mfrs. & Jobbers' Union v. Chicago, M., St. P. Ry. Co. et al., 1 I. C. C. Rep. 629, (45).

La Grange—Calloway v. Louisville & N. Ry. Co. et al., 7 I. C. C. Rep. 431, (242-A).

Lawrence—Alford v. Chicago, R. I. & P. Ry. Co., 3 I. C. C. Rep. 519, (95).

Lincoln—Lincoln Board of Trade v. Burlington & M. R. Co. et al., 2 I. C. C. Rep. 147, (55).

Lincoln Commercial Club v. Chicago, R. I. & Pac. Ry. Co. et al., 13 I. C. C. Rep. 319, (616).

McRea—Davenport Bros. & Co. v. Southern Ry. Co. et al., 11 I. C. C. Rep. 650, (435).

Middleboro—Gerke Brewing Co. v. Louisville & N. Ry. Co. et al., 5 I. C. C. Rep. 596, (164).

Milwaukee—Milwaukee Chamber of Commerce v. Flint & P. M. Ry. Co. et al., 2 I. C. C. Rep. 553, (71).

Muskogee—Muskogee Commercial Club et al. v. Missouri, K. & T. Ry. Co., 12 I. C. C. Rep. 312, (514).

Myrick—McGrew v. Missouri Pac. Ry. Co., 8 I. C. C. Rep. 620, (289).

New Orleans—New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. Ry. Co. et al., 2 I. C. C. Rep. 375, (66).

New York—New York Produce Exch. v. Baltimore & Ohio Ry. Co. et al., 7 I. C. C. Rep. 612, (252).

Nooksack—Gamble Co. v. Northern Pac. Ry. Co., 14 I. C. C. Rep. 523, (1908).

Norfolk, Neb.—Johnson v. Chicago, St.P., M. & O. Ry. Co., et al., 9 I. C. C. Rep. 221, (305).

Omaha—Martin et al v. Chicago, B. & Q. Ry. Co. et al., 2 I. C. C. Rep. 25, (47).

Omaha Com. Cl. v. Chicago & N. W. R. Co., 7 I. C. C. Rep. 386, (240).

Gustin v. Atchison, T. & S. F. R. Ry. Co. et al., 8 I. C. C. Rep. 277, (266).

Opelika—Harwell et al. v. Columbus & W. Ry. Co. et al., 1 I. C. C. Rep. 236, (31).

Pemberton—De Cou v. Pennsylvania Ry. Co. et al., 12 I. C. C. Rep. 160, (488).

Piedmont—McClelen et al. v. Southern Pac. Ry. Co. et al., 6 I. C. C. Rep. 588, (208-A).

Providence—Providence Coal Co. v. Providence &. W. Ry. Co., 1 I. C. C. Rep. 107, (17).

San Bernardino—San Bernardino Board of Trade v. Atchison, T. & S. F. Ry. Co. et al., 4 I. C. C. Rep. 104, (110-A).

Savannah—Savannah Bur. of Fr. & T. v. Charleston & S. Ry. Co. et al., 7 I. C. C. Rep. 458, (243).

Sioux City—Grain Shippers' Asso. of Iowa v. Illinois Cent. Ry. Co. et al., 8 I. C. C. Rep. 158, (263).

Sioux Falls—Daniels v. Chicago, R. I. & P. Ry. Co. et al., 6 I. C. C. Rep. 458, (200).

Tifton—Mayor and Council of Tifton v. Louisville & N. Ry. Co., 9 I. C. C. Rep. 160, (301).

Troy—Troy, Ala., Board of Trade v. Alabama Midland Ry. et al., 6 I. C. C. Rep. 1, (170-A).

Union Springs—Union Springs Commercial Asso. v. Louisville & N. Ry. Co. et al., 12 I. C. C. Rep. 372, (**521**).

Walla Walla—Evans v. Oregon Ry. & Nav. Co., 1 I. C. C. Rep. 325, (**32**).

Wichita—Mayor and Council of Wichita v. Missouri Pac. Ry. Co. et al., 10 I. C. C. Rep. 35, (**336**).

Johnston-Larimer Co. et al. v. Atchison, T. & S. F. Ry. Co., 12 I. C. C. Rep. 47, (**462**).

Johnston,Larimer Co. et al. v. New York & Tenn. S. S. Co. et al., 12 I. C. C. Rep. 58, (**464**).

Johnston-Larimer Co. et al. v. Atchison, T. & S. F. Ry. Co. et al., 13 I. C. C. Rep. 388, (**624**).

Wilmington—Hilton Lumber Co. v. Wilmington & W. Ry. Co. et al., 9 I. C. C. Rep. 17, (**291**).

Dewey Bros. Co. v. Baltimore & O. Ry. Co. et al., 11 I. C. C. Rep. 475, (**408**).

CHAPTER XVII.

DISCRIMINATIONS AND PREFERENCES—CIRCUMSTANCES JUSTIFYING PREFERENCES AMONG LOCALITIES—COMPETITION.

192. In General.
193. Competition by Water-lines and by Intra-State or Foreign Railroads.
194. Competition by Carriers Subject to the Act—Early Decisions by the Commission.
195. Same Subject—Early Federal Decisions.
196. Same Subject—Commission Decisions from 1892 to the Alabama Midland Decision.
197. Same Subject—Circuit Court Decisions During the Same Period.
198. Same Subject—Commission Decisions Between the Alabama Midland and East Tennessee, Va. & Ga. R. Co. Cases.
199. Competition Between Markets—Commercial Competition—Equalizing Natural or Geographical Advantages.
200. Same Subject—Early Decisions—The Behlmer Case.
201. Effect of the Recognition of Competition as a Justification for Preference Among Localities.
202. Qualifications of the Effect of Competition.
203. Same Subject—In Spite of Competition at the Preferred Point, Rates may be Unreasonable or Create an Undue Preference.
204. Same Subject—Early Commission Decisions on Preferences Between Localities Modified by East Tenn., Va. & Ga. v. I. C. C.
205. Same Subject—Rate to Competitive Point may not be Less than the Cost of Transportation.
206. Same Subject—Further Qualifications — Suppression of Competition.
207. Basing Point Rates — Result of the Decisions on Section 4 — Applications under the Proviso.
208. Incidental Questions under Section 4.

192. In General.

Wherever the cost of carriage in reaching two points differs materially, this justifies a corresponding difference in the rates charged to each; indeed, in the absence of other considerations properly influencing the respective rates, it would entitle the point to which the cost of service is less, to a less rate. The principal items entering into the cost of service as an element in determin-

ing rates have been discussed in connection with Section 1, and it is not necessary to take them up in detail at this point.[1] The question as to how far a difference in the value of the service to different points justifies a difference in rates has also been considered to a certain extent. In the following chapter it is proposed to review briefly the decisions with reference to the effect to be given to competition in fixing or legalizing rates. Up to about the year 1903, the greater part of the Court litigation under the Act to Regulate Commerce turned principally on this question.

193. Competition by Water-lines and by Intra-State or Foreign Railroads.

In the first important opinion delivered by the Commission, it was held that traffic which was subject to the competition of carriers by water could properly be given lower rates than that not subject to such competition, and that where there was such competition at a longer distance point and not at a shorter one, this circumstance justified a greater charge to the latter.[2] Even in the face of such competition the rate to the nearer point must not be unreasonable *per se,* nor must that to the far point be so low as to be less than the actual cost of carriage, thus throwing the deficit on the local traffic.[3] Also, a disparity between the rates to the competitive and non-competitive points is not justified where such disparity is excessive and greater than the competition necessitates.[4]

The competition by water, given effect in the early decisions by the Commission, must have been that of carriers which would have taken the identical freight unless the railroad had met the water rate; these decisions did not recognize the competition of water carriers from other markets than the point of shipment of the freight in question, to the point of destination, this species of competition being termed "commercial" or "market" competition.[5]

(1) Supra, Chaps. V and VI.

(2) Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, 72, (13).

(3) Infra, §205.

(4) Infra, §§202, 203.

(5) James & Mayer Co. v. Cincinnati, N. O. & T. P. R. Co., 4 I. C. C. Rep. 744, 755, (132-A).
Fewell v. Richmond & D. R. Co., 7 I. C. C. Rep. 354, 373, (237).
See infra, §§199-201.

In another early case the Commission held that competition by water, in order to be effective, must be actual and not merely speculative, and must relate to traffic important in amount.[6]

In a number of decisions it was held that the evidence showed actual competition by water in respect to traffic important in amount, sufficient to justify a greater charge for the shorter distance, or a preference of the competitive point.[7] In others, the evidence failed to make out such water competition.[8]

The same is true of the competition of intra-state and foreign [9]

(6) Harwell v. Columbus & W. R. Co., 1 I. C. C. Rep. 236, 248-249, (31).

(7) Lehmann & Co. v. Southern Pac. R. Co., 4 I. C. C. Rep. 1, (103).
Rice v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 228, (115).
King v. New York, N. H. & H. R. Co., 4 I. C. C. Rep. 251, (116).
Delaware St. Gr. v. New York, P. & N. R. Co., 4 I. C. C. Rep. 588, (125).
Spokane Mer. Un. v. Northern Pac. R. Co., 5 I. C. C. Rep. 478, (157).
Chattanooga Bd. of Tr. v. East T., V. & G. R. Co., 5 I. C. C. Rep. 546, (162-A).
Savannah Bur. of F. & T. v. Charleston & S. R. Co., 7 I. C. C. Rep. 458, (243).
New York Pro. Ex. v. Baltimore & O. R. Co., 7 I. C. C. Rep. 612, (252).
Dallas Frt. Bur. v. Texas & P. R. Co., 8 I. C. C. Rep. 33, (256).
Holdzkom v. Michigan Cent. R. Co., 9 I. C. C. Rep. 42, (292).
Santa Bar. Com. Cl. v. Southern Pac. R. Co., 12 I. C. C. Rep. 495, (549).
Ex parte Koehler, 25 Fed. 73, (1885); 31 Fed. 315, (1887).
I. C. C. v. Atchison, T. & S. F. R. Co., 50 Fed. 295, (110-B).
(Reversing San Bernardino Bd. of Tr. v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 104), (110-A).

(8) Re Columbus & W. R. Co., 1 I. C. C. Rep. 626, (1888).
Bates v. Penn. R. Co., 3 I. C. C. Rep. 435, (89-A); (but see 4 I. C. C. Rep. 281), (89-B).
Raworth v. Northern Pac. R. Co., 5 I. C. C. Rep. 234, (148), etc.
Spokane Mer. Un. v. Northern Pac. R. Co., 5 I. C. C. Rep. 478, 505, (157).

(9) Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, 80, (13).
During the period that the Commission recognized only competition by water and by foreign and intra-state roads as justifying preferences between localities, the carriers so often set up water competition as a justification as to arouse the suspicion of the Commission as to its actual presence in some cases.
See for example Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, 80, (13).

roads, and also of pipe-lines.[10] In order to render such competition effective it must, of course, appear that it in fact influences the rate situation.[11]

194. Competition by Carriers Subject to the Act—Early Decisions by the Commission.

The first case in which the Commission discussed the question as to whether or not the operation of competition of carriers subject to the Act at the far and not at the near point justified a greater charge to the latter, or a preference of the former, was Re Louisville & N. R. Co.[12] The facts there presented a case where a direct line competed with one which started in the opposite direction and, after winding about, finally reached the same destination by a much longer route. It was held that the competition of the direct line justified the circuitous one in charging a rate to the competitive point at the end of the route lower than that to nearer intermediate points, the Commission stating that the competition of carriers subject to the Act justified a preference or an exception to the long and short haul provision only in rare and peculiar cases, where a strict application of the general rule of the statute would be destructive of legitimate competition.

This construction of the Act was followed by the Commission until November, 1892. Although competition by interstate carriers was held insufficient in all but very clear cases,[13] it was recognized that in exceptional instances such competition might justify a preference or a less charge for the greater distance without pre-

Business Men's Asso. v. Chicago, St. Paul, M. & O. R. Co., 2 I. C. C. Rep. 52, (48).

Business Men's League v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 318, 359, (311).

(10) Indep. Ref. Asso. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 457, (155-A).

(11) Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 12, (46). Raworth v. Northern Pac. R. Co., 5 I. C. C. Rep. 234, (148), etc.

(12) 1 I. C. C. Rep. 31, (13).

(13) Farmington, etc., Board of Trade v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep. 215, (29).
Raymond v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep. 230, 234, (30).
Re Passenger Tar. & Rate Wars, 2 I. C. C. Rep. 513, (1889).
Re Chicago, St. P. & K. C. R. Co., 2 I. C. C. Rep. 231, (58).
Re Tariffs & Class of A. & W. P. R. Co., 3 I. C. C. Rep. 19, 37-8, (1889).

vious application to the Commission for relief under the proviso of Section 4.[14]

195. Same Subject—Early Federal Decisions.

Meanwhile several cases had been decided by the United States Courts which, while directly involving questions of competition by water or by rail and water, had drawn no distinction between different species of competition, holding that wherever competition controlled the charge and by reason of it the road must "take what it can get, or abandon the field and let its road go to rust," a less charge to the more distant competitive point was proper.[15]

On the other hand, in charging the jury in a suit for damages for an alleged violation of Section 4, Judge Shiras had stated clearly that competition was a matter which only the Commission could consider, and that its existence did not justify the carrier in charging less for the greater distance without previous authority from the Commission.[16] The competition actually involved in this case was that of interstate railroads, but the dicta would seem to cover all kinds of competition.

196. Same Subject—Commission Decisions from 1892 to the Alabama Midland Decision.

In Trammell *v.* Clyde S. S. Co.,[17] the question came squarely before the Commission as to whether or not the competition of

(14) Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, 181, (24).
Lincoln Bd. of Tr. v. Missouri Pac. R. Co., 2 I. C. C. Rep. 155, (56).
Re Chicago, St. P. & K. C. R. Co., 2 I. C. C. Rep. 231, 257, (58).
Mankato Mfrs. Un. v. Minneapolis & St. L. R. Co., 4 I. C. C. Rep. 79, 86, (107).

(15) Ex parte Koehler, 25 Fed. 73, (1885).
Ex parte Koehler, 31 Fed. 315, 319, (1887); (see especially final paragraph, p. 322).
Missouri Pac. R. Co. v. Texas & P. R. Co., 31 Fed. 862, (1887), (where the opinion in Re L. & N. R. Co., 1 I. C. C. Rep, 31, (13), was adopted).
I. C. C. v. Atchison, T. & S. F. R. Co., 50 Fed. 295, (110-B).

(16) Osborne v. Chicago & N. W. R. Co., 48 Fed. 49, 53, (138-A). The verdict for plaintiff in this case was set aside by the Circuit Court of Appeals, but on a different point; 52 Fed. 912; 10 U. S. App. 430; 3 C. C. A. 347, (138-C).

(17) 5 I. C. C. Rep. 324, (154-A).

carriers subject to the Act justified a railroad in charging a less rate for a shorter distance, without previous application to the Commission for relief. The Commission then modified its ruling in the Louisville & Nashville R. Co. case, summarizing its conclusions as follows (p. 397):

"The carrier has a right to judge in the first instance whether it is justified in making the *greater charge for the shorter distance* under the fourth section in all cases where the circumstances and conditions arise *wholly upon its own line* or through competition for the same traffic with carriers not subject to regulation under the Act to regulate commerce. In other cases under the fourth section, the circumstances and conditions are not presumptively dissimilar and carriers must not charge *less for the longer distance,* except upon the order of the Commission."

This ruling was followed and reaffirmed in a number of cases decided by the Commission between its utterance in November, 1892, and the decision of the Alabama Midland case [18] by the Supreme Court in November, 1897. These decisions are given in the note.[19]

During this period, however, the Commission on several occasions granted an order relieving carriers from the operation of

(18) I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144; 42 L. Ed. 414; 18 Sup. Ct. 45, (170-D).

(19) Chattanooga Bd. of Tr. v. East T. V. & G. R. Co., 5 I. C. C. Rep. 546, (162-A).

Gerke Co. v. Louisville & N. R. Co., 5 I. C. C. Rep. 596, (164).

Troy Bd. of Tr. v. Alabama Mid. R. Co., 6 I. C. C. Rep. 1, (170-A).

Behlmer v. Memphis & C. R. Co., 6 I. C. C. Rep. 257, (186-A).

Hill & Bro. v. Nashville, C. & St. L. R. Co., 6 I. C. C. Rep. 343, (197).

Cordele Mach. Shop v. Louisville & N. R. Co., 6 I. C. C. Rep. 361, (198).

Johnston Co. v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 568, (207).

McClelen v. Southern P. R. Co., 6 I. C. C. Rep. 588, (208-A).

Lynchburg Bd. of Tr. v. Old Dom. S. S. Co., 6 I. C. C. Rep. 632, (211).

Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep. 224, (229-A).

Re Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 61, (1897).

Fewell v. Richmond & D. R. Co., 7 I. C. C. Rep. 354, (237).

Kentucky Bd. of R. Comrs. v. Cincinnati, N. O. & T. P. R. Co., 7 I. C. C. Rep. 380, (239).

See, however, Minneapolis Ch. of Com. v. Great Nor. R. Co., 5 I. C. C. Rep. 571, 594, (163).

(Several of the above decisions were reversed by the Federal Courts, see infra).

Section 4, because of competition by carriers subject to the Act,[20] and in most of the decisions cited in the previous note, the defendants were allowed 30 or 60 days to apply for relief before the proposed order went into effect.

197. Same Subject—Circuit Court Decisions During the Same Period.

Prior to the decision by the Commission in the Cordele Machine Shop case and the other later decisions in note [19] *supra,* the Circuit Court for the middle district of Alabama had held flatly, in passing on the application of the Commission to enforce its order in the case of Troy Bd. of Tr. *v.* Alabama Mid. R. Co.,[21] that the competition of carriers subject to the Act was a circumstance which rendered the conditions at the competitive point substantially dissimilar, and justified an exception to the rule of Section 4 without authority from the Commission.[22] This decision was rendered in July, 1895, and was affirmed by the Circuit Court of Appeals in June, 1896.[23] In January, 1896, the Circuit Court for the District of South Carolina had dismissed the petition to enforce the order of the Commission issued in Behlmer *v.* Memphis & C. R. Co.,[24] requiring defendant to desist from charging a higher rate for a less distance, on the ground, among others, that such was justified by competition of interstate carriers.[25] In April, 1896, also, the Circuit Court for the Middle District of Tennessee, in dismissing the Commission's bill to enforce its order In re Louisville & N. R. Co.'s Unlawful Rates,[26] had distinctly recog-

(20) Cincinnati, H. & D. R. Co's. Petition, 6 I. C. C. Rep. 323, (**192**). Rome, W. & O. R. Co.'s Application, 6 I. C. C. Rep. 328, (**193**).

(21) 6 I. C. C. Rep. 1, (**170**-A).

(22) I. C. C. v. Alabama Mid. R. Co., 69 Fed. 227, (**170**-B).

(23) 74 Fed. 715; 21 C. C. A. 51; 41 U. S. App. 453, (**170**-C).

(24) 6 I. C. C. Rep. 257, (**186**-A).

(25) Behlmer v. Louisville & N. R. Co., 71 Fed. 835, (**186**-B). See also I. C. C. v. Cincinnati N. O. & T. P. R. Co., 56 Fed. 925, 943-7, (**132**-B), accord.

The decision of the Circuit Court in the latter case was reversed by the Circuit Court of Appeals without opinion, 13 U. S. App. 730, and the decree of the latter Court affirmed by the Supreme Court, 162 U. S. 184; 16 Sup. Ct. 700; 40 L. Ed. 935, (**132**-C).

(26) 5 I. C. C. Rep. 466, (**156**-A).

nized the competition of interstate carriers as a circumstance properly taken into account under Sections 2 and 3 of the Act.[27]

198. Same Subject—Commission Decisions between the Alabama Midland and East Tennessee, Va. & Ga. R. Co. Cases.

The Commission, however, seemed to ignore the above decisions and persisted in applying the rule of Trammell *v.* Clyde S. S. Co., until the affirmance by the Supreme Court of the Alabama Midland case in November, 1897.[28] Even in spite of this decision, the Commission still endeavored to preserve Section 4

(27) I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 418, (**156**-B).

See also Wight v. U. S., 167 U. S. 512, 518; 42 L. Ed. 258; 17 Sup. Ct. 822, (**223**).

I. C. C. v. Detroit G. H. & M. R. Co., 167 U. S. 633, 644; 42 L. Ed. 306; 17 Sup. Ct. 986, (**100**-D).

(28) I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144; 42 L. Ed. 414; 18 Sup. Ct. 45, (**170**-D).

Federal decisions following the above case are as follows:

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648; 44 L. Ed. 309; 20 Sup. Ct. 209, (**186**-D).

East Tenn., V. & G. R. Co. v. I. C. C., 181 U. S. 1; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D).

I. C. C. v. Clyde S. S. Co., 181 U. S. 29, (**154**-B).

I. C. C. v. Louisville & N. R. Co., 190 U. S. 273; 47 L. Ed. 1047; 23 Sup. Ct. 687, (**242**-C).

Brewer v. Central R. of Ga., 84 Fed. 258, (**229**-B).

Allen v. Oregon R. & N. Co., 98 Fed. 16; 106 Fed. 265, (**270**).

I. C. C. v. Cincinnati, P. & V. R. Co., 124 Fed. 624, (**298**-B).

Decisions by the Commission following the ruling in the above cases are as follows:

Savannah Bur. v. Charleston & S. R. Co., 7 I. C. C. Rep. 458, 476, (**243**).

Cattle R. Asso. v. Fort W. & D. C. R. Co., 7 I. C. C. Rep. 513, 544, (**245**-A).

Dallas Frt. Bur. v. Texas & P. R. Co., 8 I. C. C. Rep. 33, 43, (**256**).

Dallas Frt. Bur. v. Austin & N. W. R. Co., 9 I. C. C. Rep. 68, (**295**).

Pratt Lumber Co. v. Chicago, I. & L. R. Co., 10 I. C. C. Rep. 29, (**335**).

Rock Hill Buggy Co. v. Southern R. Co., 11 I. C. C. Rep. 229, (**395**).

Spiegle & Co. v. Chesapeake & O. R. Co., 11 I. C. C. Rep. 367, (**400**).

Dewey Bros. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 475, (**408**).

Griffin Groc. Co. v. Southern R. Co., 11 I. C. C. Rep. 522, (**415**).

Farrar v. Southern R. Co., 11 I. C. C. Rep. 640, (**434**).

Goodhue v. Chicago G. W. R. Co., 11 I. C. C. Rep. 683, 687, (**439**).

Durham v. Illinois Cent. R. Co., 12 I. C. C. Rep. 37, (**460**).

Johnston Co. v. New York & T. S. S. Co., 12 I. C. C. Rep. 58, (**464**).

from total annihilation, and took up several of the cases in which its orders were based on practically the same construction of Section 4, which had been held erroneous in the Alabama Midland case, making necessary a number of additional decisions.[29]

During the next few years following the Alabama Midland decision, the Commission also held that certain cases were not governed by that decision and that certain facts constituted violations of Section 4, which, in view of the Supreme Court's rulings, could not well be sustained.[30] It was not really until after the decision in the case of East Tenn. V. & G. R. Co. *v.* I. C. C.,[31] decided in April, 1901, that the Commission acquiesced entirely in the construction of Sections 3 and 4, now recognized as the correct one, and its decisions on questions of preferences among localities, prior to the 9th volume of the reports, are scarcely reliable.

199. Competition between Markets—Commercial Competition—Equalizing Natural or Geographical Advantages.

The question of giving effect to Commercial or Market Compe-

Kansas Far. Cl. v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 351, 358-9, (**519**).

Union Sp. Com. Asso. v. Louisville & N. R. Co., 12 I. C. C. Rep. 372, (**521**).

Morse Co. v. Chicago, M. & St. P. R. Co., 12 I. C. C. Rep. 485, (**546**).

Reliance Co. v. Southern R. Co., 13 I. C. C. Rep. 48, (**575**).

Pecos Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 173, (**594**).

Duluth Com. Cl. v. Northern Pac. R. Co., 13 I. C. C. Rep. 288, (**611**).

Kentucky R. Com. v. Louisville & N. R. Co., 13 I. C. C. Rep. 300, (**614**).

Johnston-Larimer Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 388, 396, (**624**).

Randolph Co. v. Seaboard A. L. R. Co., 13 I. C. C. Rep. 601, (**649**).

Phillips Co. v. Southern Pac. R. Co., 13 I. C. C. Rep. 644, (**656**).

Gump v. Baltimore & O. R. Co., 14 I. C. C. Rep. 98, (**671**).

Flint v. Grand R. & I. R. Co., 14 I. C. C. Rep. 520, (**717**).

(29) See decisions, supra, n.28.

(30) See Calloway v. Louisville & N. R. Co., 7 I. C. C. Rep. 431, 438, (**242-A**).

Re St. Louis & S. F. R. Co., 8 I. C. C. Rep. 290, (**267**).

Tileston Mill Co. v. Northern Pac. R. Co., 8 I. C. C. Rep. 346, 359, (**272**).

Danville v. Southern R. Co., 8 I. C. C. Rep. 409, 429, (**277-A**).

Hampton Bd. of Tr. v. Nashville, C. & St. L. R. Co., 8 I. C. C. Rep. 503, 527, (**281-A**).

(31) 181 U. S. 1; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162-D**).

tition appears in connection with problems under the Act in a number of different forms. Such competition is said to exist when it appears that, unless the rate to a given point is reduced to a certain figure, such point will be supplied from other markets, shippers from the market in question not being able to pay a higher rate and still make a profit at the market price which the goods will command at the proposed point of sale. To recognize the influence of this species of competition is really nothing more than to fix rates in proportion to the value of the service to the shipper, or to counterbalance geographical or other advantages among localities by adjustment of relative rates. It amounts to applying to relative rates between competing localities the principle of charging what the traffic will bear.

200. Same Subject—Early Decisions—The Behlmer Case.

The early decisions of the Commission recognized to a certain extent that carriers were justified in counterbalancing geographical advantages by allowing proportionately lower rates to disadvantageously situated localities.[32] In the Social Circle case, however, the Commission held that the defendant was not justified in charging a lower rate from Cincinnati to Atlanta than to Social Circle, a less distant point, by reason of the fact that at a higher rate Baltimore dealers could undersell their Cincinnati competitors at Atlanta, though not at Social Circle,[33] and the Supreme Court ordered the enforcement of the Commission's order in this case.[34] In a number of other later decisions the Commission refused to recognize market competition as justifying the carrier in making an exception to the rule of Section 4, without previous authority from the Commission, although intimating that this might be ground for relief on application under the proviso of Section

(32) See supra, §§59-60.

(33) James & Mayer Buggy Co. v. Cincinnati, N. O. & T. P. R. Co., 4 I. C. C. Rep. 744, (132-A).

(34) Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184, 194; 16 Sup. Ct. 700; 40 L. Ed. 935, (132-C).

Affirming the order of the C. C. A. (13 U. S. App. 730, not reported in the Federal Reporter), and reversing the Circuit Court, 56 Fed. 925, (132-B).

4.[35] The Import Rate case [36] really was one presenting the question of market competition, but although the decision in that case necessarily held such competition to be a justification for a preference, the effect of the decision was not recognized until the Court called attention to its true scope in the Behlmer case (p. 671). In the latter decision, however, the Supreme Court distinctly held that market or commercial competition should be given the same effect as the other species.[37] The Commission has, of course, followed this decision in subsequent cases.[38]

(35) Trammell v. Clyde S. S. Co., 5 I. C. C. Rep. 324, 395, 413, (154-A).

Chattanooga Bd. of Tr. v. East Tenn., V. & G. R. Co., 5 I. C. C. Rep. 546, 567, (162-A).

Gerke Brwg. Co. v. Louisville & N. R. Co., 5 I. C. C. Rep. 596, 611, (164).

Cincinnati Frt. Bur. v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 244-5, (183-A).

Behlmer v. Memphis & C. R. Co., 6 I. C. C. Rep. 257, 265, (186-A).

Fewell v. Richmond & D. R. Co., 7 I. C. C. Rep. 354, 374, (237).

(36) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (122-D).

(37) Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 670-2; 44 L. Ed. 309; 20 Sup. Ct. 209, (186-D).

Reversing the Circuit Court of Appeals, 83 Fed. 893; 28 C. C. A. 229; 42 U. S. App. 581, (186-C); sustaining the Circuit Court, 71 Fed. 835, (186-B).

(38) Gustin v. Burlington & Mo. R. Co., 8 I. C. C. Rep. 481, (280).

Dallas Frt. Bur. v. Austin & N. W. R. Co., 9 I. C. C. Rep. 68, 71, (295).

Wichita v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 558, (323).

Kindel v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 606, 617, (327).

Bovaird Co. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 56, (576).

Pittsburg Plate Glass Co. v. Pittsburg, C. C. & St. L. R. Co., 13 I. C. C. Rep. 87, (578).

Kentucky R. Com. v. Louisville & N. R. Co., 13 I. C. C. Rep. 300, (614).

Lincoln Com. Cl. v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 319, 323, (616).

Rice v. Georgia R. Co., 14 I. C. C. Rep. 75, (668).

See, however, St. Louis Tr. Bur. v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 317, (698); a case which it would seem difficult to reconcile with the foregoing, if, as it would appear from the opinion, the case was really one involving a preference between localities, forced by competitive conditions at the preferred point.

See also Texas Cement Co. v. St. Louis & S. F. R. Co., 12 I. C. C. Rep. 68, (467).

201. Effect of the Recognition of Competition as a Justification for Preference among Localities.

In its earliest decisions the Commission laid down the rule that the law did not forbid every preference among localities, or the greater charge for the shorter distance in every case, but only where these conditions were the result of the carrier's own action. If the relation in rates complained of was not arbitrarily fixed by the railroad but was forced upon it by the unavoidable compulsion of circumstances beyond its control, the conditions were rendered dissimilar and the preference was not undue.[39] The recognition by the Courts of railroad and market competition as a factor in the creation of dissimilar circumstances, or as justifying a preference, would seem to have been not so much a modification of this principle, as a correction of the Commission's application of it. The Commission had held that whereas the competition of a water line at the far point was a factor beyond the control of a railroad endeavoring to secure freight to that point, the competition of another interstate railroad or of another market was not, although the practical result and effect in the two cases was exactly the same. The Courts merely recognized the latter fact.

202. Qualifications of the Effect of Competition.

When, under the law as it stands to-day, competition is set up as a justification for a preference or for a less charge for the greater distance, the question to be answered is whether the rate relation complained of is really forced on the defendant by competition, or whether competition is not merely the excuse alleged by the railroad for a rate relation not necessitated thereby, but the result of the arbitrary action of defendant, to further some interest of its own not recognized as a justification for a preference.[40]

(39) See Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, (**13**).
Minnesota Bus. Men's Asso. v. Chicago, St. P., M. & O. R. Co., 2 I. C. C. Rep. 52, 65-66 (**48**).
Wilmington Tar. Asso. v. Cincinnati, P. & V. R. Co., 9 I. C. C. Rep. 113, 157, (**298-A**).
Supra, §181.
Cf. Rice v. Western N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 151, (**111**).
Chicago Bd. of Tr. v. Chicago & A. R. Co., 4 I. C. C. Rep. 158, 187, (**112**).

(40) It must, of course, appear as a first requisite to the use of competition as a justification under Sections 3 or 4, that the competi-

This distinction was clearly stated by Justice Shiras in the Alabama Midland case, as follows:[41]

"In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration."[42]

The above passage was quoted by Mr. Justice White in the Behlmer case, and the following further qualification or explanation added:[43]

"It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the

tion is greater at the far point than at the near one, and where the same roads run through both points there can be no difference in the competitive conditions at each. Raworth v. Northern Pac. R. Co., 5 I. C. C. Rep. 234, 240-241, (148).

See also Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 12-24, (46).

(41) I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144, 167; 42 L. Ed. 414; 18 Sup. Ct. 45, (170-D).

(42) See also Phillips & Co. v. Louisville & N. R. Co., 8 I. C. C. Rep. 93, 106-7, (259).

Grain Shippers' Asso. v. Illinois Cent. R. Co., 8 I. C. C. Rep. 158, 177, (263).

Payne-Gardner Co. v. Louisville & N. R. Co., 13 I. C. C. Rep. 638, 643, (655).

(43) Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 674-5; 44 L. Ed. 309; 20 Sup. Ct. 209, (186-D).

determination of whether competition was such as created a substantial dissimilarity of conditions. Second. That the competition relied upon be, not artificial or merely conjectural, but material and substantial,[44] thereby operating on the question of traffic and rate-making the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered."

203. Same Subject—In Spite of Competition at the Preferred Point Rates may be Unreasonable or Create an Undue Preference.

In spite, therefore, of the existence of such competition at the far point and not at the nearer one as would justify a somewhat lower rate to the former than to the latter, the rate to the near

(44) This is merely another way of stating the principle announced by the Commission in its early decisions that the competition must be actual and not merely speculative and must relate to traffic important in amount.

See Harwell v. Columbus & W. R. Co., 1 I. C. C. Rep. 236, 248-249, (31).

In Randolph Co. v. Seaboard A. L. R. Co., 13 I. C. C. Rep. 601, 603, (649), Prouty, C., said:

"The real question in a case like this generally ought to be, not whether competition has produced at the more distant point a lower rate, but whether, under all circumstances, the rate from the competitive point fairly ought, in view of the competition, to be lower than that from the intermediate point."

Cases in which the competition relied on is speculative merely and not of controlling force, must be distinguished from cases involving potential competition, in which it appears that although at the rates charged there is no actual competition of other carriers, it is apparent that if the rates be at all raised, such carriers would at once appear and compete for the traffic. This is often the case where the competition is by water, the railroads keeping the rate just low enough to drive the water line out of the business.

See Lincoln Bd. of Tr. v. Burlington & M. R. Co., 2 I. C. C. Rep. 147, 154, (55).

Raworth v. Northern Pac. R. Co., 5 I. C. C. Rep. 234, 246, (148).

I. C. C. v. Alabama M. R. Co., 74 Fed. 715, 723; 21 C. C. A. 51; 41 U. S. App. 453, (170-C).

Re Cotton Rates, etc., 8 I. C. C. Rep. 121, 124, (261).

Cf. Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep. 224, 236, (229-A). (reversed in 84 Fed. 258), (229-B).

point may still be found to be unreasonably high under Section 1, or in case of disparity between the two rates greater than the stress of competition necessitates, the rate relation may constitute an undue preference of the more distant point under Section 3.[45] In the latter case it would seem to be a doubtful, although perhaps an academic question, as to whether such facts would present a violation of Section 4. That Section would seem to deal only with the question as to whether the near rate properly exceeded the far one, and to have nothing to do with the propriety of the amount of the excess, leaving this to Section 3.[46]

Under the qualification to the competition rule above stated, the rate to the near point may be held to be unreasonable *per se,* although that to the far point is properly less, and in a number of cases the Commission has so held.[47] It must be remembered, however, in connection with such decisions, that there is scarcely ever a case in which a rate can be said to be unreasonable *per se,* judged absolutely by itself.[48] Practically all questions of reasonableness under Section 1 are determined by the comparison of the rate in

(45) See, for example, Cincinnati Frt. Bur. v. Cincinnati N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 238, (183-A).

Payne-Gardner Co. v. Louisville & N. R. Co., 13 I. C. C. Rep. 638, (655).

Also infra, §204.

(46) From one decision by the Commission it would seem that it regarded the facts above suggested as constituting a violation of Section 4 as well as of Section 3.

Gardner & Clark v. Southern R. Co., 10 I. C. C. Rep. 342, 348, (355).

From another case it would appear that Sections 1 and 3 were the only provisions violated.

Marten v. Louisville & N. R. Co., 9 I. C. C. Rep. 581, 601, (325).

See also East Tenn., V. & G. R. Co. v. I. C. C., 181 U. S. 1, 22, 23; 21 Sup. Ct. 516; 45 L. Ed. 719, (162-D).

On principle, however, it would seem that once a lower rate to the far point were justified, the fourth section could have nothing further to do with the rate relation.

(47) Re St. Louis & S. F. R. Co., 8 I. C. C. Rep. 290, 301, (267).

Hampton Bd. of Tr. v. Nashville C. & St. L. R. Co., 8 I. C. C. Rep. 503, 527, (281-A). (Reversed in I. C. C. v. Nashville C. & St. L. R. Co., 120 Fed. 934; 57 C. C. A. 224), (281-B).

Wichita v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 534, 556-557, (322).

Farrar v. Southern R. Co., 11 I. C. C. Rep. 632, (433).

(48) See supra, §§49, 91.

question with other rates. Although the short distance rate might well be held unreasonable by comparison with rates to other non-competitive points, in a number of cases under Section 4, where the Commission has declared rates to the near point unreasonable *per se,* it has really meant that they are unreasonable as compared with those to the far point, for, as pointed out by the Supreme Court,[49] its order has permitted the carrier to remedy the situation either by raising the far rate to the level of the near one, or by reducing the latter.

204. Same Subject—Early Commission Decisions on Preferences between Localities Modified by East Tenn., Va. & Ga. v. I. C. C.

In a number of cases decided by the Commission prior to the Supreme Court's decision in East Tenn., Va. & Ga. R. Co. *v.* I. C. C.[50] (April, 1901), it was held that the competition in question did not justify the great disparity in rates there appearing.[51] In reading these decisions, it is well to bear in mind that the East Tennessee case held, in opposition to the contention of the Commission, that the right of the carrier to charge less for the greater distance under substantially dissimilar circumstances was not destroyed by the mere fact that an incidental preference of a far point might result.[52]

(49) East T., V. & G. R. Co. v. I. C. C., 181 U. S. 1, 23; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D).

I. C. C. v. Louisville & N. R. Co., 190 U. S. 273, 284; 47 L. Ed. 1047; 23 Sup. Ct. 687, (**242**-C).

Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 217-8; 28 Sup. Ct., 268; 52 L. Ed., 493, (**155**-F).

See also I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 416, (**156**-B).

I. C. C. v. Southern R. Co., 117 Fed. 741, (**277**-C); 122 Fed. 800, (**277**-C).

(50) 181 U. S. 1; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D).

(51) Spokane Mer. Un. v. Northern Pacific R. Co., 5 I. C. C. Rep. 478, (**157**).

Chattanooga Bd. of Tr. v. East Tenn., V. & G. R. Co., 5 I. C. C. Rep. 546, 568-9, (**162**-A).

Colorado F. & I. Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, (**201**-A).

Marten v. Louisville & N. R. Co., 9 I. C. C. Rep. 581, (**325**).

Gardner & Clark v. Southern R. Co., 10 I. C. C. Rep. 342, (**355**).

(52) See also Chattanooga Ch. of Com. v. Southern R. Co., 10 I. C. C. Rep. 111, 134, (**341**).

Aberdeen Com. Gr. v. Mobile & O. R. Co., 10 I. C. C. Rep. 289, 305, (**350**).

205. Same Subject—Rate to Competitive Point may not be less than the Cost of Transportation.

Another qualification on the effect of competition, stated by the Commission in its first important decision, and also in subsequent opinions by the Federal Courts, is that competition at the far point will not justify to such point rates lower than the actual cost of transportation,[53] for such a situation would necessitate an increase of charges on other traffic to make up the deficiency.[54]

Neither the Commission nor the Court has suggested the form of order which would be issued to remedy this sort of case. The Commission has held that it has no power to order a carrier to raise a rate,[55] and to reduce the other rates to the same level would only make matters worse.

206. Same Subject—Further Qualifications—Suppression of Competition.

If there be real and substantial competition at the far and not at the near point, the mere possibility that competition may arise at the near point is not sufficient to entitle the latter to the same rate, since the fourth section of the Act has reference to an actual dissimilarity of conditions and not to a merely conjectural one.[56] So, also, it is immaterial that the competition at the far point was originated by one of the defendants.[57] If, however, it appeared that at the near point competition had been suppressed by agree-

(53) By cost of transportation is here meant the cost which would not have been incurred had the particular shipment in question not been moved. Cost of maintenance and interest on fixed charges is not included.

(54) Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, 65-67, (13).
Kindel v. Boston & A. R. Co., 11 I. C. C. Rep. 495, 507, 510, (412).
East T., V. & G. R. Co. v. I. C. C., 181 U. S. 1, 20; 21 Sup. Ct. 516; 45 L. Ed. 719, (162-D).

(55) See infra, §274.

(56) I. C. C. v. Louisville & N. R. Co., 190 U. S. 273, 282-3; 47 L. Ed. 1047; 23 Sup. Ct. 687, (242-C).
See also I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1018-9 (364-B).

(57) I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1016-7, (364-B), and cases cited.
Compare Morse Company v. Chicago, M. & St. P. R. Co., 12 I. C. C. Rep. 485, (546).

ment or combination among carriers, this fact would be proper to consider in determining the question of undue preference or of the reasonableness *per se* of the rates at the near point.[58] In such a case the competition at the far point would not be the real controlling cause of the disparity in rates.

207. Basing Point Rates—Result of Decisions on Section 4—Applications under the Proviso.

The cases in which questions under Section 4 of the Act have most frequently come before the Commission and the Courts, are those involving rates constructed on the Basing Point System. The rate to the near point in such cases is made up of the sum of the rate to the far point plus the local rate back.

The Commission has always been opposed to rates constructed by this method, taking the position that any through rate made up of the sum of two locals is presumptively unreasonable, especially where the higher rate is to an intermediate point.[59] After the Alabama Midland decision, the Commission held that where

(58) I. C. C. v. Louisville & N. R. Co., 190 U. S. 273, 283; 47 L. Ed. 1047; 23 Sup. Ct. 687, (242-C).

See also I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144, 172; 42 L. Ed. 414; 18 Sup. Ct. 45, (170-D).

East Tenn., V. & G. R. Co. v. I. C. C., 99 Fed. 52, 61, (162-C).

East Tenn., V. & G. R. Co. v. I. C. C., 181 U. S. 1, 25-27; 21 Sup. Ct. 516; 45 L. Ed. 719, (162-D).

Calloway v. Louisville & N. R. Co., 7 I. C. C. Rep. 431, 438, (242-A).

Sprigg v. Baltimore & O. R. Co., 8 I. C. C. Rep. 443, 474, (279).

Hampton Bd. of Tr. v. Nashville, C. & St. L. R. Co., 8 I. C. C. Rep. 503, 528, (281-A).

(59) Basing point rates were condemned in a great many cases prior to the Alabama Midland decision. Among the principal ones are the following:

Harwell v. Columbus & W. R. Co., 1 I. C. C. Rep. 236, (31).

Hamilton v. Chattanooga R. & C. R. Co., 4 I. C. C. Rep. 686, (129).

Perry v. Florida C. & P. R. Co., 5 I. C. C. Rep. 97, 116, (142).

Troy Bd. of Tr. v. Alabama Mid. R. Co., 6 I. C. C. Rep. 1, (170-A).

Hill v. Nashville C. & St. L. R. Co., 6 I. C. C. Rep. 343, (197).

Cordele Mach. Shop v. Louisville & N. R. Co., 6 I. C. C. Rep. 361, (198).

Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 484, (200).

Dawson Bd. of Tr. v. Central R. of Ga., 8 I. C. C. Rep. 142, 157, (262).

See also Des Moines Com. v. Chicago G. W. R. Co., 14 I. C. C. Rep. 294, 297, (696).

Also supra, §§97-99.

the competition at the far point did not reduce that rate below what was reasonable, a higher rate to the near point was presumptively excessive.[60] This decision was reversed, however, by the Circuit Court,[61] and in subsequent cases the Commission has unwillingly given its sanction to Basing Point rates.[62]

The result of the decisions with regard to the influence of competition is to make Section 4 of the Act, for all practical purposes, a dead letter,[63] but every case which would present a violation of Section 4 is also covered by the broader language of Section 3.

In some instances the proviso at the end of Section 4, authorizing the Commission to relieve carriers from the operation of that Section on application and investigation, might possibly be used, but no such case has been found in the Commission's reports subsequent to 1898.[64]

(60) Hampton Bd. of Tr. v. Nashville, C. & St. L. R. Co., 8 I. C. C. Rep. 503, 527, (281-A).

See also Re St. Louis & S. F. R. Co., 8 I. C. C. Rep. 290, (267).

And Danville v. Southern R. Co., 8 I. C. C. Rep. 409, 437, (277-A).

(61) I. C. C. v. Nashville C. & St. L. R. Co., 120 Fed. 934; 57 C. C. A. 224, (281-B).

See also I. C. C. v. Southern R. Co., 117 Fed. 741, (277-C); 122 Fed. 800, (277-C).

(62) Holdzkom v. Michigan Cent. R. Co., 9 I. C. C. Rep. 42, 57, (292).

Chattanooga Ch. of Com. v. Southern R. Co., 10 I. C. C. Rep. 111, 137, (341).

In the case last cited the Commission upheld the greater charge for the less distance, although it could not determine whether such was reasonable or unreasonable. (See supra, §§92, 184),

See also Charlotte Sh. Asso. v. Southern R. Co., 11 I. C. C. Rep. 108, (386).

Durham v. Illinois Cent. R. Co., 12 I. C. C. Rep. 37, (460).

Union Sp. Com. Asso. v. Louisville & N. R. Co., 12 I. C. C. Rep. 372, (521).

(64) Cases prior to that date where the Commission granted relief from the rule of Section 4 are as follows:

Re Application of Fremont E. & M. R. Co., 6 I. C. C. Rep. 293, (1895).

Re Cincinnati H. & D. Co.'s Petition, 6 I. C. C. Rep. 323, (192).

Re Atchison, T. & S. F. R. Co.'s Petition, 7 I. C. C. Rep. 593, (248).

As to Practice, see Rule of Practice, No. XIX, infra, Appendix.

(63) The Kentucky Courts have refused to adopt a similar construction of the provision of the Kentucky Constitution, copied from Section 4 of the Act.

See Louisville & N. R. Co. v. Com., 46 S. W. 707.

Under this proviso the Commission will act only on formal applica-

208. Incidental Questions under Section 4.

Certain incidental questions under Section 4, decided by the Commission or by the Courts, are given in the note.[65]

tion by the carrier, and an opinion as to the legality of a less rate for a greater distance will not be given informally at the request of a railroad.

Re Southern Pac. R. Co., 1 I. C. C. Rep. 6, (1).

Re Columbus & W. R. Co., 1 I. C. C. Rep. 626, (1888).

See also Colorado F. etc. Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 493-4, (201-A).

The power to authorize exceptions to the rule of Section 4 does not confer on the Commission the power to require them, on complaint of the long distance locality.

Thatcher v. Delaware & H. C. Co., 1 I. C. C. Rep. 152, 155, (22).

Where the circumstances are substantially similar the power to relieve carriers from the operation of Section 4 is exclusive in the Commission.

I. C. C. v. Atchison, T. & S. F. R. Co., 50 Fed. 295, 300, (110-B).

Missouri Pac. R. Co. v. Texas & Pac. R. Co., 31 Fed. 862, (1897).

(65) In a case where a less charge was made for a haul through the less distant point to a point beyond, the Commission held that this was not justified, under Section 4, by the fact that the freight might have been carried over the same road by a roundabout route which did not pass through the shorter distance point.

Perry v. Florida C. & P. R. Co., 5 I. C. C. Rep. 97, 116-117, (142).

See also Logan v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 604, (75).

Johnston Co. v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 568, 586, (207).

The charge of the same rate to a longer and shorter distance point was held not to be an admission of substantial similarity of conditions at the two, so as to make the rate for the longer distance illegal where the latter included free cartage not allowed at the shorter distance point.

Detroit G. H. & M. R. Co. v. I. C. C., 74 Fed. 803, 819; 43 U. S. App. 308; 21 C. C. A. 103, (100-C); (reversing I. C. C. v. Detroit, G. H. & M. R. Co., 57 Fed. 1005; and Stone v. Detroit, G. H. & M. R. Co., 3 I. C. C. Rep. 613).

In this case the Circuit Court of Appeals held that the word "aggregate" in Section 4, extended the long and short haul rule to cover not only charges for transportation by rail, but charges for accessorial services as well, where such were incidental to and furnished in connection with transportation by rail.

Detroit, G. H. & M. R. Co. v. I. C. C., 74 Fed. 803, 821; 43 U. S. App. 308; 21 C. C. A. 103, (100-C).

The Supreme Court, although affirming the decree of the Circuit Court of Appeals and professing to agree with its conclusions, stated that in its

opinion Section 4 referred only to charges for transportation by rail proper and had nothing to do with the question of free cartage.

I. C. C. v. Detroit, G. H. & M. R. Co., 167 U. S. 633, 644; 42 L. Ed. 306; 17 Sup. Ct. 986, (100-D).

It would seem that in so holding the Supreme Court did not perhaps have clearly in mind the force given by the Circuit Court of Appeals to the word "aggregate."

CHAPTER XVIII.

FACILITIES FOR THE INTERCHANGE OF TRAFFIC AND DISCRIMINATION BETWEEN CONNECTING LINES.

209. Provisions of the Act.
210. Origin of the Provisions.
211. Cases at Common Law.
212. Different Methods of Reasoning in Cases Decided under the Act.
213. Chicago & A. R. Co. v. Pennsylvania R. Co.
214. Kentucky & Ind. Br. Co. v. Louisville & N. R. Co.
215. Little Rock & M. R. Co. v. East Tenn., Va. & Ga. R. Co., (3 I. C. C. Rep. 1).
216. Little Rock & M. R. Co. v. St. Louis. I. M. & S. R. Co.
217. Little Rock & M. R. Co. v. East Tenn., Va. & Ga. R. Co., (47 Fed. 771).
218. New York & N. R. Co. v. New York & N. E. R. Co.
219. Oregon Sh. L. & U. N. R. Co. v. Northern Pac. R. Co.
220. Little Rock & M. R. Co. v. St. Louis & S. W. R. Co.
221. Summary of Foregoing Decisions.
222. Effect of the Hepburn Amendment, Giving the Commission Power to Establish Through Routes and Joint Rates.
223. Have Carriers any Rights under the Act, *qua* Carriers, Based on Discrimination between Connecting Lines?
224. Same Subject — Use of Tracks and Terminal Facilities.
225. Same Subject—Is the Power to Prescribe Through Routes Necessary to Prevent Discrimination between Connecting Lines?
226. Same Subject—Difficulties in Connection with the Problem under Discussion.
227. Same Subject — Conclusion from the Cases.
228. Incidental Points Decided under Paragraph 2 of Section 3.

209. Provisions of the Act.

The second paragraph of Section 3 of the original Act was as follows:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their

rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This paragraph has never been altered. The Amendment of 1906, however, made it the duty of the railroads to establish through routes and joint rates and also introduced the following provision into Section 15:

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

210. Origin of the Provisions.

The provision in Section 3 was based on the English Railway and Canal Traffic Act of 1854, as supplemented by the Regulation of Railways Act of 1873.[1] The first of these Acts had required

(1) Section 2 of the Act of 1854 is as follows:

"Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such

the giving of reasonable facilities for through traffic by connecting carriers, but without the express prohibition of discrimination in rates and charges among connecting lines found in Section 3 of our Act.[2] The Act of 1873 added to that of 1854, above quoted, a clause to the effect that the facilities mentioned in the Act of 1854 should include the forwarding, at through rates, of through traffic at the request of connecting lines, or of any person interested in through traffic. The Act then provided that the company or person requiring the traffic to be forwarded give written notice to the carrier, which should be answered within a specified time by the latter. In case of objection by the carrier the Commissioners should decide whether the granting of the rate or route was in the interest of the public and whether, having regard to the circumstances, the route proposed was a reasonable route. If these questions were answered in the affirmative, the Commission could fix a through rate and apportion the same among the connecting lines.

It will be noted that the essential difference between the Act of 1854 and the second paragraph of our Section 3, is that in the former there is no intimation that the provision is intended for the benefit of connecting carriers, while our statute contains an express prohibition of discrimination in rates and charges between connecting lines and an express requirement that carriers accord not only "reasonable" but "equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith."

It is believed that the Commission and the Courts have not fully recognized this distinction between the two statutes.[3] In so far as the English Act of 1854 and our Cullom Act failed to confer power

preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

(2) This latter provision, together with the important word "equal," was added by Congress to the bill prepared by the Cullom Committee.

(3) See Little Rock & M. R. Co. v. East Tenn., Va. & Ga. R. Co., 3 I. C. C. Rep. 1, 6-8, (77).

on the Commission to prescribe through rates,—this power being conferred by supplemental English legislation in 1873 and by our Hepburn Amendment,—there is an analogy in the development of the two statutes. In view, however, of the clause in our original Act prohibiting discrimination and requiring equal facilities between connecting lines, it is believed that analogies drawn from the English Statute cannot well control decisions of cases arising under our Act. The lack of power on the part of the Commission to prescribe through rates would, of course, preclude the Commission from compelling a carrier, at the instance of a shipper, to join in a through rate with another carrier. It is not believed, however, that this lack of power could in any way affect the authority of the Commission to order the railroads to cease from discriminating in facilities allowed connecting lines.[4] In the decisions, both by the Commission and by the Courts, on the second paragraph of Section 3, the principles above suggested have not been clearly differentiated. The distinction has not been recognized between cases of discrimination among connecting lines and cases where a through route is demanded by a shipper.

211. Cases at Common Law.

The principal questions which have arisen under paragraph 2 of Section 3 are, first,—whether, when a carrier has established a through route and through rates with one connecting line, the Act requires it to do so with all others similarly situated; and, second,—if the Act so requires, whether the Commission and the Courts have power to enforce this provision.

At common law a railroad which entered into special contract relations with a connecting line for a continuous through route, with provision for through rates, through tickets and bills of lading, a conventional division of through charges and other facilities incident to a through routing agreement, was not on that account bound to join in similar through rates, or to allow the same facilities, to another road having a physical connection with its tracks.[5] Even

(4) As to the power of the Court to prevent discrimination in such cases, see infra, §336.

(5) Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667; 4 Sup. Ct. Rep. 185; 28 L. Ed. 291, (1884).

Post v. Southern R. Co., 103 Tenn. 184; 52 S. W. 301; 55 L. R. A. 481, (1899).

at common law, however, it would seem that railroads might not properly charge one connecting line more for forwarding traffic than the rates charged another line.[6] In the latter case the connecting lines are practically in the position of shippers, while under a through routing agreement they are joint forwarders of the traffic in connection with the other lines parties to the through route.[7]

212. Different Methods of Reasoning in Cases Decided under the Act.

As heretofore stated, the decisions by the Courts with reference to the effect of paragraph 2 of Section 3 are by no means satisfactory. The Commission and the Courts have held (with some exceptions) that a railroad is not required to allow the same facilities for through traffic to all connecting lines, but this conclusion was reached by several different courses of reasoning. On the reasoning of certain of these decisions, all of which were rendered prior to 1906, it would appear that the Hepburn Amendment has introduced this requirement, or at least made it effective, but by the greater part of the decisions there would seem to be no such obligation even under the legislation as it now stands.

213. Chicago & A. R. Co. v. Pennsylvania R. Co,

The first case arising under the Act which involved the question of discrimination between connecting lines was Chicago & A. R. Co *v.* Pennsylvania R. Co.[8] The Commission here held that the defendants were justified in refusing to continue a through routing agreement with the complainant, the refusal being based on the latter's continuing to pay commissions to ticket agents against defendant's protest. Neither the scope of the prohibition of Section 3, nor the power of the Commission or of the Courts to compel carriers to form through routes, were passed on in this case, the only point decided being that the discrimination was reasonable and not unjust.

(6) Samuels v. Louisville & N. R. Co., 31 Fed. 57, 60-1, (**10**). See also Cutting v. Florida Ry. & N. Co., 30 Fed. 663, (1887).

(7) See Kentucky & I. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 632; 2 L. R. A. 289, (**57-B**).

(8) 1 I. C. C. Rep. 86, (**14**).

214. Kentucky & Ind. Br. Co. v. Louisville & N. R. Co.

In Kentucky & Ind. Br. Co. *v.* Louisville & N. R. Co.,[9] the Commission issued an order requiring defendant to allow the complainant company facilities for the interchange of interstate traffic, equal to those allowed by it to other carriers. Complainant here had a physical connection with defendant's tracks, but the latter declined to join in through rates or to allow through billing and other similar facilities accorded other lines with which it had through routing agreements. The Circuit Court refused to enforce this order.[10] Judge Jackson rested his decision on four grounds; first,—that complainant was not a common carrier entitled to the protection of Section 3; second,—that the junction was not a convenient point for the interchange of traffic, and the circumstances under which complainant proposed to establish the through route were in other respects dissimilar to those existing in connection with the through routes already established with the other lines; third,—that the Act did not require carriers to enter into similar through routing agreements with all connecting lines, its provisions being primarily in the interest of shippers rather than of other railroads; and fourth,—that neither the Commission nor the Courts had power to establish through routes, or to fix through rates between connecting lines.[11]

215. Little Rock & M. R. Co. v. East Tenn., Va. & Ga. R. Co.

In Little Rock & M. R. Co. *v.* East Tenn., V. & Ga. R. Co., and St. Louis, I. M. & S. R. Co.,[12] decided by the Commission in 1889, it appeared that prior to 1888 complainant had been operating under a through routing agreement with the two defendants, connecting on the east with the East Tenn., Virgina & Georgia road at Memphis, and on the west with the St. Louis, Iron Mountain and Southern Railway at Little Rock. In that year the Iron Mountain road built a branch from a point on its main line, northeast of Little Rock, to Memphis, and thereafter refused to issue or honor through tickets via complainant's line, to or from points on

(9) 2 I. C. C. Rep. 162, (1888), (57-A).

(10) 37 Fed. 567; 2 L. R. A. 289, (57-B).

(11) Judge Barr concurred in the judgment, but rested his decision solely on the first two points.

(12) 3 I. C. C. Rep. 1, (77).

the East Tennessee, Virginia and Georgia. This branch was somewhat longer than complainant's line, and the facilities at Memphis for interchanging with the East Tennessee, Virginia and Georgia freight coming over the branch were inferior to complainant's. The Commission held that the facts involved produced a discrimination against complainant and a denial of equal facilities which the Act was evidently intended to prevent, in spite of the fact that the action of the St. Louis, Iron Mountain and Southern was taken for the purpose of keeping traffic from going from its own line to that of a rival; but that the Act did not contain the machinery provided by the English Act of 1873, for the establishment by the Commission of through routes, or for the division of through rates, and the Commission was therefore powerless to grant the necessary relief.

216. Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.

These same facts were made the basis of a complaint in Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. R. Co. et al.,[13] where the Court, relying on the foregoing decisions, dismissed the bill on the ground that the Act did not, like the English statute, invest either the Commission or the Courts with the power to compel connecting carriers to enter into through routing and through rate contracts.

217. Little Rock & M. R. Co. v. East Tenn., Va. & Ga. R. Co.

In Little Rock & M. R. Co. *v.* East Tenn., V. & G. R. Co. et al.,[14] the same facts were again involved, the proceedings being directed against the road east of Memphis. The Court held that the St. Louis, Iron Mountain and Southern had the right to prefer its

(13) 41 Fed. 559, (93).

In U. S. ex rel. Morris v. Delaware, L. & W. R. Co., 40 Fed. 101, 103, (87), Judge Wallace, in discussing a question of alleged discrimination in car distribution under the first paragraph of Section 3, had said incidentally of the second paragraph:

"This provision refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers; and the term 'facilities' does not embrace car equipment for the transportation of freight over the carrier's own road. Scofield v. Railroad Co., 2 Int. St. Com. R. 90, 116."

(14) 47 Fed. 771, (135).

own road over that of a rival,[15] and that the action of the East Tennessee, Virginia and Georgia, being forced by the position taken by the St. Louis, Iron Mountain and Southern Railway Co., was not violative of the Act. It was said that the Court was not powerless (by mandamus or by the institution of criminal proceedings) to redress a violation of the provision of the Act prohibiting discrimination between connecting carriers, there being a clear distinction between the establishment of through routes and the prohibition of a discrimination.

218. New York & N. R. Co. v. New York & N. E. R. Co.

In New York & N. R. Co. *v.* New York & N. E. R. Co., et al.,[16] the complaint was based on the defendant's discontinuance of a through rate and routing arrangement previously existing between it and complainant. The reason for so doing was that the principal defendant and the other road with which it connected had organized a boat line which, with their two roads, completed the connection for a through journey to New York, which previously could have been made by way of complainant's line only. The Commission sustained the complaint, holding that the case was distinguishable from the Little Rock case in that there the question really presented was the right of a railroad to divert from a competing line traffic which it might direct over its own line,[17] while here the case was merely one of a discrimination between independent connecting lines.[18] It also held that it had power to put in force again a previously existing through routing arrangement, although it had no power to invent a new one. In the second Little Rock case,[19] heretofore discussed, this latter dis-

(15) See also Ilwaco R. & N. Co. v. Oregon Sh. L., 57 Fed. 673; 16 C. C. A. 495; 15 U. S. App. 173, (152-B); reversing 51 Fed. 611, (152-A).

(16) 4 I. C. C. Rep. 702, (130-A).

(17) Note that in the Little Rock case the Commission expressly stated, relying on the English decisions, that this fact did not justify defendant; the opinion of the Circuit Court in 47 Fed. 771, (135), points the other way.

(18) The fact that the defendant owned a half interest in the boat line connecting with the preferred carrier was held not to make this a similar case.

(19) 47 Fed. 771, (135).

tinction was held to be unsound, the Court affirming the power of the Commission in either case, but upholding the distinction between a preference of defendant's own line and a discrimination between two independent connecting carriers.

In New York & N. R. Co. *v.* New York & N. E. R. Co., [20] the Court denied a motion to dismiss the petition of the Commission to enforce its order, holding that although a railroad might discriminate in favor of its own line or of one in which it had an interest, the discrimination in this case was not warranted by the defendant's half ownership of the boat line connecting with the preferred railroad, and that the facts constituted a violation of Section 3 of the Act. The power of the Commission and of the Court to grant the relief was not discussed, nor were the previous decisions referred to. This case would seem irreconcilable with other Federal decisions.[21]

219. Oregon Sh. L. & U. N. R. Co. v. Northern Pacific R. Co.

In Oregon Sh. L. & N. Ry. Co. *v.* Northern Pac. R. Co.,[22] the Circuit Court held that a carrier honoring through tickets over one connecting line, and receiving from it freight without change of cars, was not bound under the Act to do so for all others. This decision was affirmed by the Circuit Court of Appeals, but under the facts presented to the latter Court, the question of discrimination between connecting lines was not involved.

220. Little Rock & M. R. Co. v. St. Louis & S. W. R. Co.

In Little Rock & M. R. Co. *v.* St. Louis S. W. R. Co.,[23] the

(20) 50 Fed. 867, (130-B).

See also comments by Judge Lacombe on this case in Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co., 73 Fed. 438, 439-440, (1896).

(21) See also, however, St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. 39, (189).

Augusta So. R. Co. v. Wrightsville & T. R. Co., 74 Fed. 522, (205).

Toledo A. A. & N. M. R. Co. v. Penna. Co., 54 Fed. 746, 749; 19 L. R. A. 395, (1893); 64 Fed. 320; 12 C. C. A. 134; 22 U. S. App. 561, (1894); 166 U. S. 548; 17 Sup. Ct. Rep. 658; 41 L. Ed. 1110, (1897); as supporting the power of the Court.

(22) 51 Fed. 465, (150-A); 61 Fed. 158; 9 C. C. A. 409; 15 U. S. App. 479, (150-B).

(23) 59 Fed. 400, (178-A); 63 Fed. 775; 26 L. R. A. 192; 27 U. S. App. 380; 11 C. C. A. 417, (178-B).

Court sustained a demurrer to a bill to compel defendant to honor through tickets at reduced rates and to allow freight to go through without requiring re-billing and trans-shipment of freight and prepayment of freight charges. It appeared that these facilities were allowed competing lines with which defendant had entered into agreements for through routes and rates. The Court held that the Act neither required the allowance of the facilities prayed for, nor gave the Commission and the Courts power to compel it; also, that paragraph 2 of Section 3 was practically nullified by the proviso therein, to the effect that the main provision should not be so construed as to require a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

221. Summary of Foregoing Decisions.

Other Federal cases also held that the Act did not require a carrier forming a through route with one connecting line to do so with others,[24] and the Commission several times affirmed its decision that it had no power under the Act to compel carriers to enter into through routes and rates.[25]

We thus have three distinct lines of reasoning suggested, on which a carrier has been denied relief where connecting lines, parties to through routes with competing roads, have refused to enter into or form such a route with it: First,—that this is not required

(24) St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. 39, (189).

Gulf C. & S. F. R. Co., et al. v. Miami S. S. Co., 86 Fed. 407; 30 C. C. A. 142; 52 U. S. App. 732, (251).

Central Stk. Yds. Co. v. Louisville & N. R. Co., 118 Fed. 113; 55 C. C. A. 63; 63 L. R. A. 213, (300-B); 192 U. S. 568; 24 Sup. Ct. 339; 48 L. Ed. 565, (300-B).

(25) Mattingly v. Penna. Co., 3 I. C. C. Rep. 592, (98).

Re Clark, 3 I. C. C. Rep. 649, (1890).

Capehart v. Louisville & N. R. Co., 4 I. C. C. Rep. 265, (117).

Kentucky R. Com. v. Louisville & N. R. Co., 10 I. C. C. Rep. 173, 187-9, (343).

Cf. also Cinn. Fr. Bur. v. Cinn. N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 255, (183-A).

Diamond Mills v. Boston & M. R. Co., 9 I. C. C. Rep. 311, 315, (310).

Clark v. Lake S. & M. S. R. Co., 11 I. C. C. Rep. 558, 578, (420).

by paragraph 2 of Section 3;[26] second,—that since the establishment of a through route necessarily requires the use of the tracks and terminal facilities of each road by the other, the proviso practically nullifies the main provision;[27] and third,—that although the provision in question was intended to compel carriers forming through routes with one connection to do so with others similarly situated, yet as the Act gave the Commission and Courts no power to establish through routes they were unable to grant the necessary relief.[28]

In several cases, however, the power of the Commission and of

(26) Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 630; 2 L. R. A. 289, (**57**-B).

Oregon Sh. L. & U. N. R. Co. v. Nor. Pac. R. Co., 51 Fed. 465, (**150**-A); 61 Fed. 158; 9 C. C. A. 409; 15 U. S. App. 479, (**150**-B).

Little Rock & M. R. Co. v. St. Louis & S. W. R. Co., 59 Fed. 400, (**178**-A); 63 Fed. 775; 26 L. R. A. 192; 27 U. S. App. 380; 11 C. C. A. 417, (**178**-B).

St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. 39, (**189**).

Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co., 73 Fed. 438, (1896).

Gulf C. & S. F. R. Co. v. Miami S. S. Co., 86 Fed. 407; 30 C. C. A. 142; 52 U. S. App. 732, (**251**).

Central Stockyards Co. v. Louisville & N. R. Co., 118 Fed. 113; 63 L. R. A. 213; 55 C. C. A. 63, (**300**-B); 192 U. S. 568; 24 Sup. Ct. Rep. 339; 48 L. Ed. 565, (**300**-B).

(27) Little Rock & M. R. Co. v. St. Louis & S. W. R. Co., 59 Fed. 400, (**178**-A); 63 Fed. 775; 26 L. R. A. 192; 27 U. S. App. 380; 11 C. C. A. 417, (**178**-B).

See also Cardiff Coal Co. v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 460, 468, (**632**).

Iowa v. Chicago, M. & St. P. R. Co., 33 Fed. 391, (1887).

(28) Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co., 3 I. C. C. Rep. 1, (**77**).

Mattingly v. Penna. Company, 3 I. C. C. Rep. 592, (**98**).

Capehart v. Louisville & N. R. Co., 4 I. C. C. Rep. 265, (**117**).

Kentucky R. Com. v. Louisville & N. R. Co., 10 I. C. C. Rep. 173, 187-9, (**343**).

Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 630-1; 2 L. R. A. 289, (**57**-B).

Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co., 41 Fed. 559, (**93**); but see 47 Fed. 771, (**135**).

Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912; 10 U. S. App. 430; 3 C. C. A. 347, (**138**-C)

Courts to require carriers to cease discriminations among connecting lines has been expressly affirmed.[29]

222. Effect of the Hepburn Amendment, Giving the Commission Power to Establish Through Routes and Joint Rates.

All of the foregoing decisions were rendered prior to the Amendment of 1906. This Amendment [30] gave the Commission power, when necessary to give effect to any provision of the Act, to establish through routes and maximum joint rates, and to prescribe the division thereof and the terms and conditions under which the through route was to be operated, provided no reasonable or satisfactory through route existed.[31] If paragraph 2 of Section 3 (which was not altered by the Amendment of 1906) permits a carrier to form a through route with one connecting line without being obliged to concede the same facilities to all others similarly situated, the Amendment, of course, adds nothing to the rights of connecting carriers. If, on the other hand, Section 3 forbids such a discrimination between connecting lines, and if the only reason for the failure to enforce this provision has been the lack of power on the part of the Commission to establish through

(29) New York & N. R. Co. v. New York & N. E. R. Co., 4 I. C. C. Rep. 702, (**130**-A); 50 Fed. 867, (**130**-B).

Little Rock & M. R. Co. v. E. Tenn., Va. & G. R. Co., 47 Fed. 771, (**135**).

Augusta So. R. Co. v. Wrightsville & T. R. Co., 74 Fed. 522, (**205**).

See also Clark Co. v. Lake Shore & M. S. R. Co., 11 I. C. C. Rep. 558, 578, (**420**).

Samuels v. Louisville & N. R. Co., 31 Fed. 57, (**10**).

Toledo A. A. & N. M. R. Co. v. Penna. Co., 54 Fed. 746, 749; 19 L. R. A. 395, (1893).

Ex parte Lennon, 64 Fed. 320; 22 U. S. App. 561; 12 C. C. A. 134 (1894); 166 U. S. 548; 17 Sup. Ct. Rep. 658; 41 L. Ed. 1110, (1897).

St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. 39, (**189**).

(30) See supra, §209.

(31) As regards the constitutionality of this provision, see:

Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 634; 2 L. R. A. 289, (**57**-B).

Minnesota & St. L. R. Co. v. Minnesota, 186 U. S. 257; 46 L. Ed. 1151; 22 Sup. Ct. Rep. 901, (1902).

As to the power of the Commission to order through routes and joint rates under the Amendment of 1906, and the practice in such cases, see infra, Chap. XXIV, §275.

routes and joint rates between connecting carriers, then the Amendment of 1906 giving the Commission that power, does add considerably to the rights of connecting lines.

223. Have Carriers any Rights under the Act, qua Carriers, Based on Discrimination between Connecting Lines?

It would seem that the purpose of paragraph 2 of Section 3 was to require that the same through routing arrangements be made with all connecting lines operating under similar conditions. The provision could not have been intended to provide for the equal treatment, in respect to rates and facilities, of carriers delivering freight or passengers to a connecting road as shippers merely, for this was fully covered by Section 2 and by the first paragraph of Section 3. Paragraph 2 would seem to have been directed at the relation of connecting lines *qua* carriers, and to have intended to regulate the terms of their interchange of traffic as such. It is true that the Act was passed rather for the protection of shippers than of carriers,[32] but it is equally true that it is the shippers who ultimately benefit from the establishment of competing through routes. It is difficult to imagine what effect can be given to this provision, or what possible object can be ascribed to Congress in inserting it in the Act, unless it was intended to compel equal treatment of connecting lines in respect to through traffic arrangements.

The Act submitted to Congress by the Select Committee on Interstate Commerce did not contain the word "equal" or the phrase "and shall not discriminate in their rates and charges between connecting lines." This draft of the Act was doubtless modelled on the English provision, heretofore quoted,[33] which contained no express requirement of equal rates or facilities to connecting roads. The introduction of these words by Congress would seem to point clearly to an intention on its part to require equal treatment of connecting lines, both in rates and in the allowance of facilities for the interchange of traffic.

224. Same Subject—Use of Tracks and Terminal Facilities.

In certain of the decisions above cited, the refusal by the Court to entertain complaints of denial of equal facilities to connecting

(32) See Jackson, J., in Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 631; 2 L. R. A. 289, (57-B).

(33) See supra, §209.

lines, or of discrimination in through routing agreements, has been based on the ground that the relief asked would necessitate the defendant's giving to the complaining carrier the use of its tracks and terminal facilities, in violation of the proviso in Section 3. This conclusion, it is submitted, does not necessarily follow. Under through routing arrangements, connecting carriers do not acquire the use of one another's tracks or terminals. When a car loaded by and belonging to a connecting line is received at the junction point and taken on without trans-shipment of the freight, this cannot reasonably be said to constitute a use by the initial road of the tracks of the forwarding line. Undoubtedly, by virtue of the proviso, a carrier might properly allow one connecting line trackage rights over its road, while refusing such to others, or might rent or lease to one a portion of its terminal, without being obliged to let in all other roads on the same terms, but this is a very different matter from the mere honoring of through tickets and bills of lading, or the receipt and forwarding of freight at junction points without requiring trans-shipment, or the acceptance of divisions of through rates less than the established locals. None of the latter privileges would seem in any reasonable sense to necessitate the use of the tracks or terminal facilities of the forwarding line.[34]

225. Same Subject—Is the Power to Prescribe Through Routes Necessary to Prevent Discrimination between Connecting Lines?

The third ground for the denial of relief in these cases, has been that the Act did not give to the Commission or to the Courts power to establish through routes, or to prescribe through rates. It would seem, however, that in many cases this power was not necessary to enforce the provisions of the Act. Prior to 1906 the Commission had no power to prescribe maximum rates to be charged in the future, but where a carrier charged one shipper more than another, the Commission could order it to cease from the discrimination and could enforce its order in the Civil Courts, or have criminal proceedings instituted by the United States attorney. The order of the Commission in such cases might properly be complied with either by raising the rate charged the favored

(34) See also in general as to the purpose of this proviso, Iowa v. Chicago, M. & St. P. R. Co., 33 Fed. 391, 396-7, (1887).

shipper, or by lowering that charged the complainant. Similarly, in case of discrimination between connecting lines in the allowance of through routing facilities, although the Commission could not have forced the defendant to form a through route in connection with the complaining carrier, it could have ordered it to cease and desist from the discrimination against complainant. This order might have been complied with either by the formation of a through route with complainant or by the discontinuance of that with the favored line.[35] The carrier would usually choose the former alternative.

226. Same Subject—Difficulties in Connection with the Problem under Discussion.

A seeming difficulty with the line of reasoning suggested lies in its practical application under the Amendment of 1906. The last clause of the second paragraph of Section 1, as amended, requires the carriers to establish through routes with joint rates applicable thereto. It has been held by the Commission that although this provision was intended principally for the benefit of shippers, yet a railroad desiring a connection might take advantage of it.[36] By the amended Section 15 the Commission now has power to establish through routes and maximum joint rates and to prescribe the division and terms thereof among the connecting roads, but only where no reasonable or satisfactory through route already exists. If Section 3 confers any rights on connecting lines, these could arise only in cases where another line was unduly favored; but in such case the right of the complainant would in no way depend on the existence of a reasonable and satisfactory through route with the favored road.

If a case should now arise in which a carrier had entered into a

(35) See Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co., 47 Fed. 771, 777, (**135**).

New York & N. R. Co. v. New York & N. E. R. Co., 4 I. C. C. Rep. 702, 721, (**130-A**).

As to the power of the Court in original proceedings in such cases prior to the Elkins Act, see infra, §336.

(36) Chicago & M. El. Ry. Co. v. Illinois Cent. R. Co., 13 I. C. C. Rep. 20, 26, (**563**).

Cedar Rap. Ry. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 250, (**606**).

through traffic arrangement with one connecting road, and had formed a "reasonable and satisfactory through route" thereby, but refused to enter into a similar agreement with a rival connecting line, the Commission would have no power, on the complaint of the latter, to require the defendant to form a through route with complainant. On the interpretation of Section 3, above suggested, the Commission might, however, order the defendant to cease the discrimination between its connecting lines. The defendant might then comply with this order by discontinuing its through route with the favored road, whereupon either the latter or the complainant carrier would apply to the Commission for establishment of a through route. No matter which line secured its through route with the defendant, the other would then be in the position where the complainant started out.

227. Same Subject—Conclusion from the Cases.

This absurd result would seem to indicate that, in passing the Amendment of 1906, Congress accepted the view of the law that Section 3 did not require equal privileges to connecting lines in respect to through routing arrangements. If such be the case, paragraph 2 of Section 3 may for all practical purposes, be treated as omitted from the Act.

As appears from the foregoing discussion, the decisions on this question can hardly be reconciled and are rather unsatisfactory. The Amendment of 1906 by no means removes all the difficulties. In the author's opinion, the Courts would now hold that a connecting line may not force a carrier into a through routing arrangement merely by reason of the existence of such an agreement with another connecting line, but that where no reasonable or satisfactory through route already exists such would be established between the connecting roads at the suit either of a shipper or of one of the roads. In other words, the carriers have no rights under the Act, *qua* carriers, based on discrimination among one another.

228. Incidental Points Decided under Paragraph 2 of Section 3.

If the law be as above suggested, paragraph 2 of Section 3 might be struck from the Act without altering its effect. Also, certain other points decided by the Commission and the Courts in connection with that paragraph become immaterial. A short sum-

mary of such incidental questions would, therefore, seem to be sufficient.

In its first important decision construing paragraph 2 of Section 3, the Commission held that this paragraph forbade a carrier's refusal of equal through routing arrangements to all connecting lines, even where such an arrangement with complainant company would divert, for part of the route in question, traffic from defendant's own line to that of a rival carrier, and where it was distinctly to the defendant's advantage to have the traffic go solely by the established route.[37] The Federal Courts have uniformly held, however, that a road may properly discriminate in favor of a route over lines which it owns, as against connecting roads in which it has no interest;[38] and the Commission would seem to have accepted this view in a later decision.[39]

The Commission has ruled that the only carriers who are entitled to the protection of paragraph 2 of Section 3 are carriers subject to the other provisions of the Act, and that an independent steamship line had therefore no cause of complaint against a connecting railroad which refused to enter into a through traffic arrangement like that under which it operated in connection with a rival steamship company.[40]

In Kentucky & Ind. Br. Co. *v.* Louisville & N. R. Co.,[41] a com-

(37) Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co., 3 I. C. C. Rep. 1, 13-14, (77), following the English decisions.

(38) Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co., 41 Fed. 559, (93).

Little Rock & M. R. Co. v. East T., V. & G. R. Co., 47 Fed. 771, (135).

Ilwaco R. & N. Co. v. Oregon Sh. Line, 57 Fed. 673; 6 C. C. A. 495; 15 U. S. App. 173, (152-B); cited in West Coast, etc. Co. v. Louisville N. R. Co., 121 Fed. 645; 57 C. C. A. 671, (1903); but cf. New York & N. R. Co. v. New York & N. E. R. Co., 50 Fed. 867, (130-B).

(39) New York & N. R. Co. v. New York & N. E. R. Co., 4 I. C. C. Rep. 702, 716-717, (130-A).

See, however, Colorado Fuel Co. v. Southern Pac. R. Co., 6 I. C. C. Rep. 488, 515-516, (201-A).

(40) Capehart v. Louisville & N. R. Co., 4 I. C. C. Rep. 265, (117).

See also Re Joint Water & Rail Lines, 2 I. C. C. Rep. 645, (1889).

Re Enterprise Tr. Co., 11 I. C. C. Rep. 587, (1906).

And cf. Burton Stock Car Co. v. Chicago B. & Q. R. Co., 1 I. C. C. Rep. 132, (19).

(41) 2 I. C. C. Rep. 162, (57-A).

plaint was made under the same paragraph by a bridge company. The Commission held that this company was a common carrier *de facto* and entitled to relief, but the Circuit Court declined to enforce the order of the Commission, on the ground, *inter alia,* that complainant was not, in respect to the traffic in question, a common carrier subject to the Act.[42]

In certain other Federal cases, however, the Court, although dismissing similar complaints by carriers not subject to the Act, did not rest the decision on the ground that the complainant was not such a carrier as was entitled to relief under Section 3.[43]

Under any construction of Section 3 one connecting line could be entitled to the facilities accorded another only when the circumstances and conditions of interchange of traffic were the same or substantially similar. A discrimination between connecting roads based on a proper business reason, or upon a substantial dissimilarity of conditions, is clearly justifiable.[44]

(42) 37 Fed. 567, 615-618; 2 L. R. A. 289, (**57**-B).

(43) De Bary Baya M. Line v. Jacksonville, T. & K. W. R. Co., 40 Fed. 392, (1889).

Ilwaco R. & N. Co. v. Oregon Sh. Line, 57 Fed. 673; 6 C. C. A. 495; 15 U. S. App. 173, (**152**-B); (reversing 51 Fed. 611), (**152**-A).

St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. 39, (**189**).

Gulf C. & S. F. R. Co. v. Miami S. S. Co., 86 Fed. 407; 30 C. C. A. 142; 52 U. S. App. 732, (**251**).

Central Stock Yds. v. Louisville & N. R. Co., 118 Fed. 113; 63 L. R. A. 213; 55 C. C. A. 63, (**300**-B); 192 U. S. 568; 24 Sup. Ct. Rep. 339; 48 L. Ed. 565, (**300**-B).

See also at common law Cutting v. Florida R. & Nav. Co., 30 Fed. 663; (1887).

Samuels v. Louisville & N. R. Co., 31 Fed. 57, (**10**).

(44) Chicago & A. R. Co. v. Penna. R. Co., 1 I. C. C. Rep. 86, (**14**).

Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 620-625; 2 L. R. A. 289, (**57**-B).

See also Bragg, C., concurring in New York & N. R. Co. v. New York & N. E. R. Co., 4 I. C. C. Rep. 702, 729, (**130**-A).

CHAPTER XIX.

FILING AND PUBLICATION OF RATES AND ADHERENCE TO TARIFFS FILED.

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229. Provisions of the Act.

The provisions of the Act requiring the filing and publication of charges are contained in Section 6 and are as follows:

"Filing and Posting Schedules.—Every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its

own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

"*Rates through Foreign Countries.*—Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

"*Notice of Change in Rates.*—No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compli-

ance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

"*Joint Tariffs.*—The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

"*Copies of Contracts, Etc.*—Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

"*Commission May Prescribe Forms of Schedules.*—The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

"*Carriers Shall Not Transport Unless Rates Are Filed.*—No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the

points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided,* That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'"

. . . .

230. Purpose of Section 6.

Prior to the passage of the Act of 1887, the common law forbade carriers to charge higher rates than were reasonable, and also probably required them to treat all shippers alike. There was nothing, however, in the common law which made it obligatory on a common carrier to publish its rates, or which prevented it from altering them from day to day without previous notice. Without some requirement that rates be made public and some provision that they be subject to alteration only on proper notice, it is practically impossible to prevent discrimination.[1]

The purpose of Section 6 of the Act, as originally passed, and as supplemented by the Acts of 1889, 1903 and 1906, was to provide a standard of charge, binding alike on carrier and shipper, and open to the inspection of all interested therein. In his concurring opinion in Chicago & A. R. Co. *v.* U. S.,[2] Judge Grosscup said:

"To secure equality among shippers, the law commands, not only that the rates shall be equal, but that they shall be fixed and certain—subject to no addition or diminution against, or in favor of, anyone—so fixed and certain that any shipper can with his head and pencil figure out from the tariff sheets just what the rate is, both for himself and for his competitors."

(1) See 1st Annual Report, 1 I. C. C. Rep. 361 et seq.
Re Form of Schedules 6 I. C. C. Rep. 267, (1894).
Van Patten v. Chicago, M. & St. P. R. Co., 81 Fed. 545, 548-9, 552, (230).
As to the importance of steadiness in rates see:
Re Chicago, St. P. & K. C. R. Co., 2 I. C. C. Rep. 231, 267, (58).
2nd Annual Rep., 2 I. C. C. Rep. 430 et seq.

(2) 156 Fed. 558, 563; 84 C. C. A. 324, (430-B).

In the same case in the Court below, Judge Landis expressed somewhat the same thought as follows:

"The requirement of publication is imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only so, but the law gives him another and a very valuable right, namely, the right to know, by an inspection of the same schedule, exactly what will be the cost to his competitor of the transportation of his competitor's property." [3]

In re Tariffs of Transcontinental Lines,[4] Commissioner Walker said:

"The Act to Regulate Commerce contemplates that an end be put to the practice which previously prevailed, under which the shippers were required to ask the carriers for rates. It requires that the reverse practice should be pursued and that known and equal rates should always be announced to shippers at every point."

231. Scope of Section—Effect of the Elkins Act.

Section 6 is therefore designed both to give publicity to all charges for transportation and to provide a simple and easily accessible standard of uniformity of charge.[5] The original Act

(3) U. S. v. Chicago & A. R. Co., 148 Fed. 646, 648, (430-A).

(4) 2 I. C. C. Rep. 324, 335, (1888).

(5) In Chicago & A. R. Co. v. U. S., 156 Fed. 558, 562; 84 C. C. A. 324, (430-B), Judge Baker said:

"Under the Cullom Act (1887) the standard of comparison was the treatment of other shippers. It was necessary to prove not only that the favored shipper really paid less than the published rate, but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins Act (1903) the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed."

This statement, it is submitted, is incorrect, for Section 6 of the original Act of 1887 required the carriers to publish and file their rates and made it unlawful to charge a greater or less rate than that so published. Section 10 of the original Act also made it a misdemeanor for the directors, officers, etc., of a common carrier, willfully to do any of the things in the Act prohibited or declared to be unlawful or to omit to do any of the things therein required to be done. See Gulf, C. & S. F.

merely forbade the charging of a greater or less compensation for transportation services than that specified in the published tariff. Whether the introduction of the words "by any device whatever" in the Elkins Act broadened this provision, it would not seem necessary to discuss.[6] Under the Act as it now stands,

R. Co. v. Hefley, 158 U. S. 98, 102; 39 L. Ed. 910; 15 Sup. Ct. Rep. 802, (195). It required the Elkins Act, it is true, to make the corporation carrier itself guilty of a misdemeanor, but under the original Act the standard of comparison was the rate filed.

Prior to the Elkins Act it was held, in two cases, that the Courts had no power to declare unreasonable a rate duly filed.

Van Patten v. Chicago, M. & St. P. R. Co., 81 Fed. 545, (230).

Kinnavey v. Terminal R. Asso., 81 Fed. 802, (226).

See also Gulf Colo. etc. R. Co. v. Hefley, 158 U. S. 98; 39 L. Ed. 910; 15 Sup. Ct. Rep. 802, (195).

In one case also, employees of a corporation carrier had been convicted of charging less than the rates filed.

U. S. v. Michigan Cent. R. Co., 43 Fed. 26, (108).

See also Armour Packing Co. v. U. S., 209 U. S. 56, 70; 52 L. Ed. 428; 28 Sup. Ct. 428, (476-B).

In another case the Court overruled a demurrer to an indictment charging the officers of a railroad with accepting less than rates published.

U. S. v. Hanley, 71 Fed. 672, (202).

See also U. S. v. Egan, 47 Fed. 112, (134).

U. S. v. Great Nor. R. Co., 157 Fed. 288, 289, (490).

Re Investigation of Grand Tr. R. Co., 3 I. C. C. Rep. 89, 110, (78).

The Elkins Act made shipper and the carrier corporation responsible and expressed the requirements of filing and adherence to rates more forcibly and clearly perhaps than had been done by the Acts of 1887 and 1889. It also made the term "rebate" cover all charges less than those filed, and inserted the words "by any device whatever" in the prohibition against charging less than tariff rates, (see infra, n.6). At the time of its passage it had been shown that it was much easier to convict of departure from published rates than of discrimination, and now practically all prosecutions against carriers or their agents are based on failure to file rates or on departure therefrom, and questions of discrimination proper, as to rates, have become comparatively unimportant.

See also 17th Ann. Rep. 7-8.

15th Ann. Rep. 8.

(6) It is worthy of note that the Chesapeake & Ohio case (infra, §247), really involved the validity of the original contract which was to have been completed in 1902, prior to the passage of the Elkins Act. The Court proceeded on the theory that the original contract violated the Act as well as that entered into in the "spring of 1903," in settlement of the damage claim for the prior default.

the prohibition applies to every method of dealing by a carrier by which the forbidden result can be brought about.[7] The cases in which, under Section 2 and 3, given transactions were held to constitute "illegal devices" for allowing discriminations almost all present violations of the requirement of adherence to tariff rates.[8]

232. Form of Schedules[9]—In General.

The provisions of Section 6 are mandatory, and the Commission is bound to enforce them.[10] Rate wars are no excuse for failure to file and post rates, or to adhere to those established.[11]

The tariff schedules required under Section 6, being designed to give the average shipper accurate and easily accessible information as to rates to all points to which he may desire to ship, should be simple and easy to understand, but also complete.[12] In re Form of Rate Schedules,[13] the Commission said:

"So far as possible the schedules should be simple in arrangement, ample in their disclosures, and free from ambiguity."

A tariff which is so filled with amendments, cross-references, and exceptions as to require an expert to determine what are the actual rates between given points, does not conform to the requirements of Section 6;[14] nor does it where references are made

(7) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361, 392; 50 L. Ed., 515; 26 Sup. Ct. Rep. 272, (339-B); (infra, §247).

(8) See also supra, §124.
See also U. S. v. Del., L. & W. R. Co., 152 Fed. 269, 273, (452).

(9) It is not here attempted to give all the regulations promulgated by the Commission in Tariff Circulars or Administrative Rulings, with reference to the form and contents of rate schedules and to the proper method of filing them. These are frequently altered, and the latest tariff circular may be had at any time by writing to the Secretary of the Commission.

(10) Re Tariffs on Exp. & Imp. Traffic, 10 I. C. C. Rep. 55, 81, (338).
See, however, Rea v. Mobile & O. R. Co., 7 I. C. C. Rep. 43, 50, (216).

(11) Re Passenger Tar. & Rate Wars, 2 I. C. C. Rep. 513, 520, (1889).

(12) See 21st Ann. Rep., p. 14.

(13) 6 I. C. C. Rep. 267, 271, (1894).

(14) See Re Atlanta & W. R. Co.'s Tariffs, 3 I. C. C. Rep. 19, 66, (1889).
Rice v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 228, 246, (115).

to the tariffs of other roads with a statement that combinations by other routes will be protected.[15] It is not proper for a tariff to contain a provision for allowing certain privileges "by special arrangement." [16] Whatever variation in a rate is worked by a particular rule or regulation, must appear in the regulation itself as stated in the tariff filed, and not require the examination of extrinsic matter.[17]

Where by a combination of rates over a roundabout route by a given line, it is possible to secure a lower rate between two points than that specified in the tariffs filed, the latter are untrue; [18] the tariffs should show but one possible rate between any two points.[19]

Colorado Fuel, etc. Co. v. Southern Pac. Co., 6 I. C. C. Rep. 488, 519, (201-A).

Johnston Co. v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 568, 575-6, 578, 587, (207).

Pitts v. Atchison, T. & S. F. R. Co., 10 I. C. C. Rep. 691, 692, (379).

Re Released Rates, 13 I. C. C. Rep. 550, 562-5, (642).

Platten Co. v. Chicago, M. & St. P. R. Co., 14 I. C. C. Rep. 512, (716).

The Commission, under Tar. Circ. 15-A, Rule 9, has limited the number and size of supplements to tariffs. Slight and unimportant changes may, however, be noted by amendments to tariffs already filed.

Suffern v. Indiana, D. & W. R. Co., 7 I. C. C. Rep. 255, 278, (232).

(15) See Pitts v. St. Louis & S. F. R. Co., 10 I. C. C. Rep. 684, 688, (378).

Hydraulic Brick Co. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 342, 347, (618).

Morti v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 513, 514-5, (1908).

See also White Water Co. v. Phila. B. &. W. R. Co., 13 I. C. C. Rep. 526, 527, (1908).

Tar. Circ. 15-A, Rule 61.

(16) See Quimby v. Maine Cent. R. Co., 13 I. C. C. Rep. 246, 249, (605).

Tar. Circ. 15-A, Rule 76, (May 29th, 1907). See also Rule 69, (Mar. 18th, 1907), and Rule 75 (May 27th, 1907), in the same circular.

(17) Re Tariffs on Export and Import Traffic, 10 I. C. C. Rep. 55, 74, (338).

(18) Martin v. Southern Pac. R. Co., 2 I. C. C. Rep. 1, 10-12, (46).

Re Tariffs of Atlanta & W. P. R. Co., 3 I. C. C. Rep. 19, 73, (1889).

Cf. also Rice v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 228, 246, (115).

(19) Hydraulic Br. Co. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 342, 347, (618).

Morti v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 513, 514-515, (1908).

Tariffs must state the date on which they are to be effective, and if this be omitted the tariff is unlawful and never takes effect.[20]

The Commission does not approve of the practice of putting rates in effect for a short period merely to enable the Commission to do justice in a particular case. In order to prevent discriminations which might arise from this practice, it will order the continuance of the rates for a definite time fixed by it.[21]

233. Same Subject—Charges for Incidental Services and Regulations Affecting Rates.

The published rate should include every expense to the shipper in connection with the transportation which it purports to cover. Thus where a car furnished for oil shipments will not hold the designated quantity without being fitted specially, at an expense to the shipper, such expense is in excess of the tariff rate, and the carrier and not the shipper must bear it.[22]

Where rates are given per crate of vegetables, the tariff should state the dimensions and weight of the crate covered thereby.[23] So, also, tariffs specifying rates on oil, published by a carrier owning no tank cars, but hauling oil for certain shippers in their own tank cars, should state that the carrier does not provide tank cars, and should also specify the amount allowed for the use of the shipper's own cars, and the charge for returning them empty.[24]

Any practice or rule of a carrier which operates to alter, modify or change the rates or charges stated in the published schedules, must be fully and clearly set forth separately upon its published tariffs. Instructions to agents by a separate circular to

(20) Admin. Rul. No. 12 (Dec. 2d. 1907).

Where, however, such tariff is the first filed by the carrier it takes effect as soon as filed. Admin. Rul. No. 73, (May 5th, 1908). A tariff may properly take effect on Sunday. Admin. Rul. No. 47 (March 9th, 1908).

(21) Holcomb v. Illinois Cent. R. Co., 13 I. C. C. Rep. 16, 19, (1907).

(22) Rice v. Western N. Y. & P. R. Co., 2 I. C. C. Rep. 389, 397, (67). Cf. Victor Co. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 119, (673).

(23) Re Alleged Unlawful Charges on Vegetables, 8 I. C. C. Rep. 585, 597, (286).

(24) Rice v. Louisville & N. R. Co., 1 I. C. C. Rep. 503, 531-533, (42). See also Bannon v. Southern Exp. Co., 13 I. C. C. Rep. 516, 520, (637).

apply certain combination rates, lower than those in the regular tariffs, does not justify such charges.[25] The word "separately" in the Act means separately on the schedule, and not by a separate circular.[26]

The same is true with regard to charges for incidental services: "Whenever any service is rendered or any privilege allowed beyond the ordinary receiving, transporting and delivering of the property, that should appear upon the schedule."[27] Charges for refrigeration should be stated separately[28] and the same is true of terminal[29] and demurrage[30] charges.

Where free cartage[31] is allowed, or where the privilege is permitted of milling grain or compressing or "floating" cotton[32] in

(25) Spillers & Co. v. Louisville & N. R. Co., 8 I. C. C. Rep. 364, 367, (273).

Wilmington Tar. Asso. v. Cincinnati, P. & V. R. Co., 9 I. C. C. Rep. 118, 128-129, 159, (298-A).

(26) Süffern v. Indiana, D. & W. R. Co., 7 I. C. C. Rep. 255, 272-273, 278, 284, (232).

(27) Yeomans, C., in American W. Asso. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, 591, (247).

See also Phelps v. Texas & P. R. Co., 6 I. C. C. Rep. 36, 45, (171).

Memphis Freight Bur. v. Fort Smith & W. R. Co., 13 I. C. C. Rep. 1, 9, (561).

Tar. Circ. 15-A, Ruling 10.

(28) Re Transportation of Fruit, 10 I. C. C. Rep. 360, 374, (357-A); 11 I. C. C. Rep. 129, 141, (357-B).

Knudsen Co. v. Michigan Cent. R. Co., 148 Fed. 968; 79 C. C. A. 46, (441).

(29) Walker v. Keenan, 73 Fed. 755, 762; 19 C. C. A. 668; 34 U. S. App. 691, (184-B).

I. C. C. v. Chicago B. & Q. R. Co., 186 U. S. 320, 335; 46 L. Ed. 1182; 22 Sup. Ct. Rep. 824, (245-E).

(30) Supp. No. 1 to Tar. Circ. 15-A, p. 6.

(31) Detroit G. H. & M. R. Co. v. I. C. C., 74 Fed. 803, 815; 43 U. S. App. 308; 21 C. C. A. 103, (100-C).

From the opinion of the Supreme Court in this case it would seem that perhaps that court did not regard the publication of free cartage as necessary, unless expressly required by the Commission. See I. C. C. v. Detroit G. H. & M. R. Co., 167 U. S. 633, 646; 42 L. Ed. 306; 17 Sup. Ct. Rep. 986, (100-D).

Also American Warehousemen's Asso. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, 592, (247).

(32) Re Cotton Rates, etc., 8 I. C. C. Rep. 121, 135, (261).

transit, or of stopping cattle for sorting and reconsignment,[33] or of sawing logs into boards and re-shipping at the balance of the through rate,[34] the schedule should so specify. The same is true where free storage is allowed,[35] or where passenger tickets permit stopping over or extension of time limit in case of sickness.[36] Allowances to shippers for car-door boards used in shipping coal cannot be made except as specified in the tariffs.[37]

Rates for private cars should also be published and filed,[38] as should those for parcel express service.[39] Maximum and minimum carload regulations should also be set out.[40] Where the rate includes delivery over an independent switching road, the tariff should so state;[41] and it must also specify transfer charges if such are to be exacted.[42]

A rate ostensibly for transportation only cannot properly in-

(33) Shiel v. Illinois Cent. R. Co., 12 I. C. C. Rep. 210, 215, (**498**).

(34) Central Yel. Pine Asso. v. Vicksburg S. & P. R. Co., 10 I. C. C. Rep. 193, 216, (**344**).

(35) American Warehousemen's Asso. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, 591, (**247**).
Penna. Millers' Asso. v. Phila. & R. R. Co., 8 I. C. C. Rep. 531, 560, (**283**).
Blackman v. Southern R. Co., 10 I. C. C. Rep. 352, 359, (**356**).
See also England v. Baltimore & O. R. Co., 13 I. C. C. Rep. 614, 618, 619, (**652**).

(36) Tar. Circ. 15-A, Rule 84.

(37) Victor Co. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 119, (**673**).
Cf. Rice v. Western N. Y. & P. R. Co., 2 I. C. C. Rep. 389, 397, (**67**).

(38) Carr v. Northern Pac. R. Co., 9 I. C. C. Rep. 1, 16, (**290**).

(39) Walker v. Baltimore & O. R. Co., 12 I. C. C. Rep. 196, 198, (**494**).

(40) Suffern v. Indiana D. & W. R. Co., 7 I. C. C. Rep. 255, 272-273, (**232**).

(41) Leonard v. Chicago, M. & St. P. R. Co., 12 I. C. C. Rep. 492, (**548**).
See also Admin. Rul. No. 64.

(42) Schwager v. Great Nor. R. Co., 12 I. C. C. Rep. 521, 524, (**553**).
Beekman Co. v. St. Louis S. W. R. Co., 14 I. C. C. Rep. 532, (**718**).
Admin. Rul. No. 59 (Apr. 7th, 1908).

clude the purchase price of the commodity.[43] A condition in a passenger ticket making it non-transferrable, is void and non-enforceable, unless such condition is stated in the tariff filed.[44] Where a tariff allowed half rates on return shipments over the same route, the carrier may not refund on the basis of half rates where the return is by another line [45] without the express authority of the Commission [46] nor may a carrier refund to a passenger additional fare exacted by reason of his having been subpœnaed as a witness in court, and for that reason having exceeded the time limit allowed in the tariff for "stop-over," [47] A carrier, however, may lawfully make a refund on unused parts of passenger tickets.[48] An eastbound tariff may not be applied to westbound shipments unless the tariff so specifies.[49]

234. Commutation, Excursion and Mileage Tickets.

In the Party Rate case, Judge Jackson, in the Circuit Court, intimated that excursion, commutation and mileage tickets might be excepted from the operation of the Act by the proviso of Section 22, and that such need not be published and filed under Sec-

(43) Re Coal Rates by Atchison, T. & S. F. R. Co., 10 I. C. C. Rep. 473, (367).

(44) Baltimore & O. R. Co. v. Hamburger, 155 Fed. 849, (531).
See also Admin. Rul. No. 75.
Compare Laning-Harris Co. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 148, (589), where the Commission refused to award to a shipper the cost incurred by him in cleaning stock-cars, although the tariff did not provide for this service by the shipper and it was necessary to enable him to ship hay, defendant having no box cars on hand. In this case the shipper had agreed to stand the expense. See also Admin. Rul. Nos. 19 and 78, similar cases where no agreement appeared, but where the carrier was willing to reimburse the shipper.
Cf. also Laning-Harris Co. v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 479, (543).
Missouri & K. Sh. Asso. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 411, 417, (627).

(45) Admin. Rul. No. 42, (Mar. 3rd, 1908).

(46) Minneapolis Co. v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 128, (586).

(47) Admin. Rul. No. 60 (Apr. 7th, 1908).

(48) Admin. Rul. No. 76 (May 12th, 1908).

(49) Admin. Rul. No. 52 (Mar. 11th, 1908).

tion 6.[50] The Commission, however, has always required the filing of such rates.[51]

235. Export and Import Rates.

In one of the first important decisions on the Act, the Supreme Court affirmed the power of the Commission to require the publication of export and import rates.[52]

Under former rulings of the Commission it was held that where the railroad had formed a joint through route and rate in connection with a steamship line, the total through rate should be stated, but where the two were acting independently of one another the inland rate only need be filed.[53] By a recent decision, however, only the inland portion need be published, but this must not vary, even though it be a part of a through rate with an ocean line.[54]

(50) I. C. C. v. Baltimore & O. R. Co., 43 Fed. 37, 41, (**91-B**).

Cf. also the requirement in the proviso of Section 22, with regard to the publication of joint mileage tickets, as indicating that Congress considered that without such a requirement in Section 22 such rates need not be published.

(51) Pittsburg C. & St. L. R. Co. v. Baltimore & O. R. Co., 3 I. C. C. Rep. 465, (**91-A**).

Tar. Circ. 15-A, Rulings Nos. 52, 68.

(52) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 220-221; 16 Sup. Ct. Rep. 666; 40 L. Ed. 940, (**122-D**).

(53) Re Export & Domestic Rates, 8 I. C. C. Rep. 214, 276, (**265**).

Re Tariffs on Export & Import Traffic, 10 I. C. C. Rep. 55, 63, 70, (**338**).

Armour Co. v. U. S. 153 Fed. 1, 12; 82 C. C. A. 135, (**476-A**).

Chicago, B. & Q. R. Co. v. U. S., 157 Fed. 830, 833, (**542**).

See also N. Y. Prod. Ex. v. N. Y. C. R. Co., 3 I. C. C. Rep. 137, 138-140, (**82**).

N. Y. Bd. of Tr. v. P. R. Co., 4 I. C. C. Rep. 447, 511, (**122-A**).

As to such rates see also Kemble v. Boston & A. R. Co., 8 I. C. C. Rep. 110, 119, (**260**).

Re Cotton Rates, 8 I. C. C. Rep. 121, 140-1, (**261**).

Re Export & Dom. Rates, 8 I. C. C. Rep. 214, 272-6, (**265**).

(54) Cosmopolitan Shipping Co. v. Hamburg Am. Packet Co., 13 I. C. C. Rep. 266, 281, (**608**).

In this case the Commission said that under Section 6 a joint rate must be between two carriers subject to the Act, and that the ocean part of a shipment to a non-adjacent foreign country was not subject thereto. The same principle would seem to apply to through rates which include team or wagon transportation. See also Admin. Rul. No. 62 (Apr. 14th, 1908). Tar. Circ. 15-A, Rule 86.

Ullman v. Adams Exp. Co., 14 I. C. C. Rep. 340, (**701-A**).

Similarly, "when rates established to apply between points within a single State are applied as part of combination rates on transportation through different States, such State rates, as well as the interstate rates with which they are combined, must be published at stations and filed with this Commission as provided in Section 6 of the Act." [55]

236. Joint Rates.

Where joint through rates are made with semi-private tap-line lumber roads, the divisions allowed such roads must appear in the tariffs.[56]

In Consolidated Forwarding Company *v.* Southern Pac. R. Co.,[57] Commissioner Clements said:

"By the provisions of the sixth section of the Act, two kinds or classes of routes are recognized and provided for. The first is that of a single individual or separate road, which is required to print, keep open to inspection at stations along its line, and to file with the Commission such rates of fares and charges for transportation as it may establish. The other is a continuous line or route operated by more than one carrier where the several carriers operating such a line or route establish joint tariffs of rates or fares or charges for such continuous line or route. In respect of both classes of these lines or routes the provision is uniform." [58]

Under the Amendment of 1906 it is not necessary for each carrier, party to joint rates, to file a separate copy of such rates.[59] One of the roads should file the tariff and each of the others must file a certificate of its concurrence therein.[60]

(55) Clements, C., in Re Export Rates, 8 I. C. C. Rep. 185, 213, (264).

(56) Central Yel. P. Asso. v. Vicksburg, S. & P. R. Co., 10 I. C. C. Rep. 193, 216, (344).

(57) 9 I. C. C. Rep. 182, 205-206, (302-A).

(58) The Amendment of 1906 altered the provisions with regard to the publication of joint tariffs to a certain extent; see supra, pp. 11-12.

(59) See also Re Joint Tariffs, 1 I. C. C. Rep. 225, (1887).

But cf. U. S. v. New York Cent. & H. R. Co., 153 Fed. 630, 632-3, (471).

(60) Re Form & Contents of Rate Schedules, 6 I. C. C. Rep. 267, 282-3, (1894).

See form in Tar. Circ. 15-A, pp. 28-36, 51-59; Rule No. 83, (Nov. 15th, 1907).

Some carriers file merely a general concurrence in all tariffs in which

The Commission has held that it is not permissible for a carrier subject to the Act, to form and file joint through rates in connection with a stage coach company, receiving as its share of the freight a less sum than its regular local rate.[61]

237. Change of Rates During Transit.

The rate in force at the time of shipment must be adhered to during the entire journey to the destination specified in the original bill of lading. In case of a shipment over but one line, this is obvious, but where the haul is over several connecting roads operating under a joint routing agreement there was formerly some doubt as to whether, when a change of rate became effective while the freight was in course of transit over the first stage of a through shipment, the new or the old rate applied to the later stages. The Commission has recently held that where a through rate has been recognized by the issuance of a through bill of lading, or by any of the other recognized evidences thereof, the rate at the date of initial shipment must be adhered to throughout the haul, no matter whether the through rate was a distinct joint through rate, or a combination of local rates used on through

they are named as parties, to apply in all cases except where specific notice is given to the Commission of non-concurrence. See 18th Ann. Rep., p. 71; Tar. Circ. 15-A, pp. 33-35.

Tariffs not concurred in are unlawful. Admin. Rul. No. 13 (Dec. 6th, 1907).

As to the effect of participation in through transportation, as binding a carrier to rates not filed or concurred in by it, see infra, Chap. XXVII, §351; also, supra, §§29-35.

It has been held that failure by a connecting line to file its concurrence in an agreed through rate does not justify the delinquent carrier in refusing to accept a through ticket issued in accordance with the agreement.

Cherry v. Chicago & A. R. Co., 191 Mo. 489; 90 S. W. 381, (1905).

(61) Wylie v. Northern Pac. R. Co., 11 I. C. C. Rep. 145, 154, (**388**).

See also Cary v. Eureka Springs R. Co., 7 I. C. C. Rep. 286, (**235**), and Cosmopolitan Shipping Co. v. Hamburg Am. Packet Co., 13 I. C. C. Rep. 266, 281, (**608**).

Cf. also New York, N. H. & H. R. Co. v. Platt, 7 I. C. C. Rep. 323, (**236**), a case which it would seem difficult to reconcile with the Import Rate Case, 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940, (**122-D**).

See discussion of these cases, supra, §§146, 187-190.

business. Any other construction would give to tariffs a retroactive effect.[62]

238. Posting Rates.

The Commission originally held that to post a notice in stations stating that the tariffs might be seen on application to the agent in charge, was not a sufficient compliance with the Act. It appeared, however, that tariffs posted in stations were constantly mutilated, and the Commission therefore refused to make an order requiring strict compliance with this provision.[63] By a recent administrative ruling (June 2d, 1908), the Commission has suspended the requirement of posting rates, the carriers being required to furnish each station agent with tariffs showing all rates applying to and from the station of which he has charge. They must also keep a complete file of all tariffs at certain specified points. All such tariffs must be accessible to anyone wishing to inspect them, without the assignment of any reason for his desire to do so, and notice to this effect must be posted in all stations.[64]

Prior to this ruling the Commission held that export rates should be posted at the points of origin and also at the ports where the railroad delivered the freight to the ocean carrier;[65] but that such rates need be posted only at the offices or depots of the railroad company and it was not required to post them in the rooms of a Board of Trade, or Cotton Exchange.[66] Through joint rates

(62) Re Through Routes and Rates, 12 I. C. C. Rep. 163, (489).
Cf. Consolidated Fwd. Co. v. Southern Pac. R. Co., 9 I. C. C. Rep. 182, 206, (302-A).
And see Admin. Rul. No. 6, (Nov. 11th, 1907), No. 77, (May 14th, 1908), No. 53 (Mar. 11th, 1908), and No. 80 (June 9th, 1908).
The time of notice in advancing or reducing rates is to be computed from the day when the notice of the advance or reduction reaches the office of the Commission in Washington.
Circ. of Mar. 23, 1889, 2 I. C. C. Rep. 656.

(63) Rea v. Mobile & O. R. Co., 7 I. C. C. Rep. 43, 50, (216).
Paxton Tie Co. v. Detroit S. R. Co., 10 I. C. C. Rep. 422, 427, (363).
But see, Johnson v. Chicago, St. P., M. & O. R. Co., 9 I. C. C. Rep. 221, 237, (305).

(64) See also Admin. Rul. No. 86, (June 25th, 1908).

(65) New Orleans Cot. Exch. v. Louisville, N. O. & T. R. Co., 4 I. C. C. Rep. 694, 699, (1891).

(66) Same case, p. 700.

need not have been posted at intermediate non-competitive stations on the route over which the freight passed.[67]

239. What Necessary to Put Rates Legally in Force.

To establish a given rate as the lawful one to be charged, the rate need not be posted in the stations, all that is required being that it be filed with the Commission and forwarded to the agents of the railroad.[68] Failure to post the rate, however, may render the carrier liable to prosecution.

240. Effect of Filing Rates—Reasonableness of Tariff Charges Can be Raised only before the Commission.

In Poor Grain Co. *v.* Chicago, B. & Q. R. Co., [69] Commissioner Harlan said:

"When once lawfully published, a rate, so long as it remains uncancelled,[70] is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special Act of Congress. When regularly published it is no longer the rate imposed by the carrier, but the rate imposed by the law."

Section 6 makes the rate filed the standard of reasonableness, conclusive as to every one except the Commission. When a carrier has filed and published a rate in accordance with this Section of the Act, the reasonableness of such rate cannot be inquired into by a court or jury. Even prior to the passage of the Elkins Act it was held that an answer alleging that the rates charged were those duly published and filed, presented an absolute defense

(67) Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912, 917; 10 U. S. App. 430; 3 C. C. A. 347, (**138**-C).

(68) Texas & Pac. R. Co. v. Cisco Oil Mill, 204 U. S. 449; 51 L. Ed. 562; 27 Sup. Ct. Rep. 350, (**454***).
Pueblo Co. v. Southern Pac. R. Co., 14 I. C. C. Rep. 82, (**669**).
See also U. S. v. Howell, 56 Fed. 21, 29-30, (1892).
And cf. cases, infra, §§244, n85.

(69) 12 I. C. C. Rep. 418, 422, 469, (**528**).
See also Gerber v. Wabash R. Co., 63 Mo. App. 145; 5 Int. Com. Rep. 458, (1895).

(70) A carrier having duly filed a rate will not be permitted to withdraw it for the purpose of correcting it or changing it. Such alterations must be made in the manner prescribed by the Act. Tar. Circ. 15-A, Rule 85.

to an action for excessive charges.[71] In another case it was held that a statement claiming damages for unreasonable rates, which did not allege that the defendant had no published schedule or that the rates charged were in excess of those published, did not set out a cause of action.[72] From the opinion in the Van Patten case, above cited, it would appear that Judge Shiras considered that not even the Commission might award damages for charging the rate filed, although that rate might be unreasonable. Such is not the law under the leading case on the subject, which holds that the Commission alone has power originally to entertain proceedings for the alteration of an established schedule, on the ground that the rates fixed therein are unreasonable, and that a shipper who has been compelled to pay such rates has no redress in either the State or Federal Courts until the Commission, after investigation, has declared the tariff rates unreasonable.[73]

(71) Van Patten v. Chicago, M. & St. P. R. Co., 81 Fed. 545, (1897), (**230**).

(72) Kinnavey v. Terminal R. Asso., 81 Fed. 802, (1897), (**226**).
See also Swift v. Phila. & R. R. Co., 64 Fed. 59, 69, (**174**-B).
Gulf C. & S. F. R. Co. v. Hefley, 158 U. S. 98, (1895); 39 L. Ed. 910; 15 Sup. Ct. Rep. 802, (**195**).

(73) Tex. & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; 51 L. Ed. 553; 27 Sup. Ct. Rep. 350, (**454**).
Texas & Pac. R. Co. v. Cisco Oil Mill, 204 U. S. 449; 51 L. Ed. 562; 27 Sup. Ct. Rep. 350, (**454***).
(Appeals from Texas Court of Appeals).
American Union Coal Co. v. Penna. R. Co., 159 Fed. 278, (**584**).
Meeker v. Lehigh Valley R. Co., 162 Fed. 354, (**646**).
The mere fact that the Commission, in a different proceeding between different parties, has passed on the reasonableness of rates on a given commodity, does not give the Courts jurisdiction to pass on a claim for damages for exacting unreasonable tariff rates on traffic over a different line.
Howard Supply Co. v. Chesapeake & O. R. Co., 162 Fed. 188, (**628**).
See also cases decided under State Statutes:
Young v. K. C., St. J. & C. B. R. Co., 33 Mo. App. 509.
Windsor Coal Co. v. Chicago & A. R. Co., 52 Fed. 716, (1892).
McGrew v. Missouri Pac. R. Co., 114 Mo. 210; 21 S. W. 463.
Carlisle v. Missouri Pac. R. Co., 168 Mo. 652; 68 S. W. 898, (1902).
Chicago, B. & Q. R. Co. v. People, 77 Ill. 443, (1875).
Sorrell v. Central R. Co., 75 Ga. 509, (1885).
Burlington C. R. & N. R. Co. v. Dey, 82 Ia. 312; 48 N. W. 98.
The Commission may award damages for excessive charges, although these were made in accordance with tariffs filed.

241. Same Subject—Discrimination Cases.

In the Kinnavey case (*supra*), in addition to the complaint based on unreasonableness under Section 1, it was also alleged that the defendant had discriminated in favor of a competitor of com-

Cattle Raisers' Asso. v. Fort Worth & D. C. R. Co., 7 I. C. C. Rep. 513, 553-4, (245-A).

Coomes v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 192, (597).

Flint Co. v. Lake S. & M. S. R. Co., 14 I. C. C. Rep. 336, (700).

Nicola Co. v. Louisville, N. R. Co., 14 I. C. C. Rep. 199, 204, (685).

See also infra, §§280 and 307.

An order of the Commission is necessary, however, to enable the carrier legally to refund excess charges, and no carrier may pay any refund from its published charges except with the specific authority of the Commission.

Goff-Kirby Co. v. Bessemer & L. E. R. Co., 13 I. C. C. Rep. 383, 387, (623).

Although the principle underlying a reparation order applies to all similar shipments, no refunds may be made on such like shipments except with the Commission's specific authority.

Tar. Circ. 15-A, Ruling 81, (June 7th, 1907).

Admin. Rul. No. 49, (Mar. 9th, 1908).

And cf. Howard Supply Co. v. Chesapeake & O. R. Co., 162 Fed. 188, (628).

Nicola Co. v. Louisville & N. R. Co., 14 I. C. C. Rep. 199, 205, (685).

The Abilene case has by no means settled all questions as to the effect of the filing of a rate on a subsequent demand by a shipper to recover the excess. The principal reason of the Court for holding the tariff rate conclusive on all but the Commission was to prevent different Courts and juries from fixing different rates as the reasonable charges for the same transportation. Suppose, however, the Commission decides that a given amount is a reasonable rate, and awards damages on that basis. In such case, on appeal to a Court and jury, this award cannot be held conclusive without violating the 7th Amendment of the Constitution, and different juries may still fix different amounts as a basis for damages.

Section 6 of the Act is not unconstitutional as depriving the shipper of his property without due process of law.

U. S. v. Great Nor. R. Co., 157 Fed. 288, (490).

Cf. also U. S. v. Vacuum Oil Co., 158 Fed. 536, (572).

U. S. v. Standard Oil Co., 155 Fed. 305, 309, 310, (530-A).

The filing of a tariff and its remaining on file without the Commission's objection, does not legalize it.

San Bernardino Bd. of Tr. v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 104, 114-115, (110-A).

Suffern & Co. v. Indianapolis D. & W. R. Co., 7 I. C. C. Rep. 255, 279, (232).

See also 15th Ann. Rep., p. 41-42.

Tar. Circ. 15-A, pp. 22-48.

plainant by a less charge for the same service. Judge Adams held that the statement of claim on account of discrimination was sufficient, although it did not allege that complainant was charged more than scheduled rates, or that the rate charged was not filed.[74] On the other hand, in a recent case in the Circuit Court for the Eastern District of Louisiana, Judge Saunders dismissed a discrimination suit based on the exaction of car-service charges from shippers under local bills of lading, while none were exacted from those shipping under through bills, because there was no allegation that the charges complained of were in violation of tariff rates.[75] In the latter case the petition neither alleged nor denied that the tariff specified that car service charges would be made on local bills and not on through ones, but the inference was that it did so specify. If such were the case, the decision might possibly be distinguishable from one where the suit is based on discrimination in charging complainant the tariff rate. while charging another a less rate. On the pleadings, however, the cases would seem to be difficult to reconcile.

242. Same Subject—Can the Courts Enjoin the Filing or Enforcement of a Proposed Schedule?

(See also infra, §§336-337).

Whether or not the principle announced in the Abilene case precludes a Federal Court from granting an injunction to restrain the enforcement of an established schedule, until the Commission has passed on its reasonableness, would seem to be a debatable question. If the syllabus in Southern R. Co. *v.* Tift [76] correctly states the opinion of the Supreme Court, it would seem that that body considers that the Courts have such power. Injunctions, asked after the schedules went into effect, have been refused by a Circuit Court [77] and by the Circuit Court of Appeals for the Ninth

(74) American Co. v. Penna. R. Co., 159 Fed. 278, (584), accord.

(75) Clement v. Louisville & N. R. Co., 153 Fed. 979, (487).

(76) 206 U. S. 428; 51 L. Ed. 1124; 27 Sup. Ct. Rep. 709, (319-C). Tift v. Southern R. Co., 123 Fed. 789, (319-A); 138 Fed. 753, (319-B); 148 Fed. 1021, (divided court), (319-B).

In the appeal before the Supreme Court this question would not seem to have been involved, but the decision by the Circuit Court, is, of course, an authority in support of the power of the Court to enjoin the establishment of the rates.

(77) Potlatch Co. v. Spokane Falls R. Co., 157 Fed. 588, (570).

Circuit.[78] In another case the Court stated that, while it had the power, it would not exercise it in the case then before it, since the schedule had not yet gone into effect, and as the Commission had no power to pass on the reasonableness of a rate not yet established, if the injunction were granted the question could never come before the Commission.[79] Judge Newman, however, in the Northern District of Georgia, granted a preliminary injunction to restrain an increase of lumber rates to go into effect two days thereafter, and later extended the order to give the complainants opportunity to present the question of the reasonableness of the increase in rates to the Commission.[80] and Judge Speer, in the Southern District of Georgia, has recently made a similar ruling.[81] In Potlatch Lumber Co. *v.* Spokane Falls R. Co., above cited, Judge Hanford distinguished two unreported cases in which Judges in the same Circuit (9th) had granted injunctions, on the ground that the injunctions were there issued before thirty days had elapsed after the filing of the rates, and hence before they were legally in effect.[82]

243. Same Subject—Difficulties Incident to Enjoining the Enforcement of Proposed Schedules.

The difficulty involved in enjoining the filing of a schedule of rates alleged to be unreasonable, or in the enforcement of such a schedule, after filing, during the thirty days or subsequent thereto, is that if the injunction be issued before the rates go into effect, the Commission, with its present powers, could never pass upon their reasonableness, and the issuance of the injunction would amount to the fixing, by the Court, of rates to be charged for the future. The decisions of the Supreme Court hold flatly that the

(78) Great Nor. R. Co. v. Kalispell Lumb. Co., 165 Fed. 25, (**565-B**).

(79) Jewett Bros. v. Chicago, M. & St. P. R. Co., 156 Fed. 160, (**532**). Cf., however, Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, (**313**), where the Commission, of its own motion, investigated the reasonableness of a proposed advance.

Cf. also I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, 624, (**275-B**).

(80) Kiser Co. v. Central of Ga. R. Co., 158 Fed. 193, (**569**).

(81) Macon Groc. Co. v. Atlantic C. L. R. Co., 163 Fed. 738, (**712**). Northern Pac. R. Co. v. Pacific C. L. M. Asso. 165 Fed. 1, (C. C. A.), (**726**), accord.

Union Pac. R. Co. v. Oregon & W. L. M. Asso., 165 Fed. 13, (C. C. A.), (**726**), accord.

(82) 157 Fed. 588, 589, (**570**).

Courts have not this power,[83] for although the Amendment of 1906 conferred it upon the Commission, this Amendment did not extend the power of the Courts in this respect. If, on the other hand, the injunction be issued after the thirty days have elapsed, it would seem that, until the Commission had passed on the rate, the carrier could not charge any rate at all, for the old rate, having been cancelled, would no longer be the legal rate filed in accordance with the Act. The Court has no power to suspend Section 6, or to authorize the carrier to charge the old rate without first having allowed it to remain on file for thirty days. The Commission, it is true, has this power, and a solution of this difficulty might be found in its issuance of a general order permitting all carriers who have been enjoined by the Courts from enforcing established schedules, to collect rates in accordance with the tariffs which have been superseded by schedule covered by the injunction, pending the investigation by the Commission.[84] The question is certainly not free from difficulty.

244. Same Subject—Tariff Rates Binding on both Carrier and Shipper—Contracts for Different Rates Unenforceable.

The published rate is binding alike on the carrier and shipper, and they may not contract for a different rate.[85]

(83) See infra, §271.

(84) See Merchants' Tr. Asso. v. Pacific Exp. Co., 13 I. C. C. Rep. 131, 132, (1908).

(85) In Omaha Com. Cl. v. Chicago & N. W. R. Co., 7 I. C. C. Rep. 386, 401, (240), Knapp, Ch., said:

"The Commission has no authority to enforce the performance of contracts; and the rights of the parties to this proceeding are not based upon contract obligations. If the rates in controversy discriminate unjustly against Omaha, they would be none the less unlawful though maintained under the most formal contract; and if they do not thus discriminate the carriers may rightfully continue them in force, though in so doing they violate their proven agreement."

See also U. S. ex rel. v. Norfolk & W. R. Co., 143 Fed. 266, 268-270, (389-B).

Church v. Minneapolis & St. L. R. Co., 14 S. Dak. 443; 85 N. W. 1001, (1901).

See also Atchison, T. & S. F. R. Co. v. Holmes, 18 Okl. 92; 90 Pac. 22, (1907).

The same principle holds true of rates in conformity with or in violation of Section 6. The legality of the published rate is in no way affected by agreements between shipper and carrier.

Red Cloud Co. v. Southern Pac. R. Co., 9 I. C. C. Rep, 216, 219, (**304**).

Admin. Rul. No. 20, (Jan. 6th, 1908).

Southern Ry. Co. v. Willcox, 99 Va. 394; 39 S. E. 144, (1901).

Missouri, K. & T. R. Co. v. Bowles, 1 Ind. Terr. 250; 40 S. W. 899, (1897).

Southern R. Co. v. Harrison, 119 Ala. 539; 24 So. 552; 43 L. R. A. 385, (1898).

Savannah F. & W. R. Co. v. Bundick, 94 Ga. 775; 21 S. E. 995; 5 Int. Com. Rep. 289, (1894).

St. Louis & S. F. R. Co. v. Ostrander, 66 Ark. 567; 52 S. W. 435, (1899).

San Antonio & A. P. R. Co. v. Clements, 20 Tex. Civ. App. 498; 49 S. W. 913, (1899).

Missouri, K. & T. R. Co. v. Stoner, 5 Tex. Civ. App. 50; 23 S. W. 1020, (1893).

See, however, Haddock v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 296, 314, (**120**).

And cf. Hurlburt v. Lake Shore & M. S. R. Co., 2 I. C. C. Rep. 122, 125-6, (**52**).

Contracts between carriers and shippers are presumed to have been governed by the tariffs or classification in force at the time of making such contracts.

Smith v. Great Nor. R. Co., (N. Dak.), 107 N. W. 56, (1906).

If a shipper has been undercharged, the delivering carrier is bound to collect the difference from him so as to make up the amount of the tariff rate.

Admin. Rul. No. 3, (Nov. 4th, 1907), and No. 16, (Jan. 6th, 1908).

Missouri, K. & T. R. Co. v. Trinity Co., 1 Tex. Civ. App. 553; 21 S. W. 290, (1892).

San Antonio & A. P. R. Co. v. Clements, 20 Texas Civ. App. 498; 49 S. W. 913, (1899).

As to whether a state court has jurisdiction to award reparation for charges in excess of tariff rates the authorities are in conflict.

See Banner v. Wabash R. Co., 131 Ia. 405; 108 N. W. 759, (1906), where damages were awarded in such a case.

Contra, Wabash R. Co. v. Sloop, 200 Mo. 193, 217; 98 S. W. 607, (1906).

See also infra, §340.

Where no rate has been published, however, it has been held by State Courts that a contract for a rate less than the regular rate is valid, provided no undue discrimination be effected by its allowance.

See Atlanta, K. & M. R. Co. v. Horne, 106 Tenn. 73; 59 S. W. 134, (1900).

Gulf, C. & S. F. R. Co. v. Leatherwood, 29 Tex. Civ. App. 507; 69 S. W. 119, (1902).

Southern Kas. Ry. Co. v. Burgess, (Tex. Civ. App.), 90 S. W. 189, (1905).

Chicago, R. I. & P. R. Co. v. Gardner, (Tex. Civ. App.), 86 S. W. 793.

Wabash R. Co. v. Sloop, 200 Mo. 198; 98 S. W. 607, (1906).

In certain of the foregoing cases it was held that the failure on the

Shippers and consignees cannot depend on what rate may be quoted by the carrier's agent.[86] Since the law requires that tariffs be open to public inspection, shippers are charged with notice of the rate lawfully applicable and the Commission will not consider an erroneous rate quotation made by an agent of a carrier as a basis for an award of reparation to a shipper who thereby suffers damage.[87] A State statute making it unlawful for a rail-

part of the carrier to post the rates filed with the Commission rendered the contract for lower rates enforceable. In view of the subsequent decision by the Supreme Court in Texas & Pac. R. Co. v. Cisco Oil Mill, 204 U. S. 449; 27 Sup. Ct. Rep. 350; 51 L. Ed. 562, (**454***), this conclusion would seem no longer to be the law.

See supra, §239.

The authorities would not appear to be in harmony as to whether the burden of proof in such cases is on the carrier to prove that a different rate was filed than that specified in the contract, or on the shipper to show that either the contract rate or no rate at all was filed.

See, as supporting the first view:

Southern Pac. Co. v. Redding, et al., 17 Tex. Civ. App. 440; 43 S. W. 1061, (1897).

Southern Kas. R. Co. v. Burgess Co., (Tex. Civ. App.), 90 S. W. 189, (1905).

Wabash Ry. Co. v. Sloop, 200 Mo. 198; 98 S. W. 607, (1906).

And in support of the second view:

Atlanta, K. & M. R. Co. v. Horne, 106 Tenn. 73; 59 S. W. 134, (1900).

Kinnavey v. Terminal R. Asso., 81 Fed. 802, (**226**).

(86) Suffern, etc. Co. v. Indiana, D. & W. R. Co., 7 I. C. C. Rep. 255, 278-9, (**232**).

Re Released Rates, 13 I. C. C. Rep. 550, 562, (**642**).

But see Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 94-98, (**173**).

(87) Poor Grain Co. v. Chicago, B. & Q. R. Co., 12 I. C. C. Rep. 469, (**528**).

Forster Bros. v. Duluth, S. S. & A. R. Co., 14 I. C. C. Rep. 232, 236, (**688**).

See also Mannheim Co. v. Erie & W. Tr. Co., 72 Minn. 357; 75 N. W. 602, (1898).

But see *contra*, Coupland v. Housatonic R. Co., 61 Conn. 531; 23 Atl. 870, (1892).

It would seem to be immaterial that the contract for a rate lower than the tariff calls for was entered into by mistake.

Houston & T. C. R. Co. v. Dumas, 43 S. W. 609, (Tex. Civ. App.), (1897).

Chicago, R. I. & P. R. Co. v. Hubbell, 54 Kas, 232; 38 Pac. 266; 5 Int. Com. Rep. 241, (1894).

road to charge a greater sum than that specified in the bill of lading, is unconstitutional as applied to an interstate shipment, where the rate charged was that filed in accordance with the Act, although greater than that specified in the bill of lading.[88] In the leading case on this point a suit had been brought under a Texas statute for treble damages for refusal by a railroad to deliver freight on tender of the charges specified in the bill of lading, the railroad having demanded the higher rates on file with the Commission. The Supreme Court, reversing the Texas Court of Appeals, held that the rights of both the shipper and the carrier were fixed by the rate filed and published, and that the consignee could become entitled to the goods only on payment of that rate.[89]

A provision in a passenger ticket to the effect that the ticket is non-transferable is not enforceable where the tariff covering such ticket does not specify this condition. An injunction to prevent the selling of such tickets has been refused on this ground.[90]

See, however, Pond-Decker Co. v. Spencer, 86 Fed. 846; 30 C. C. A. 430, (246). Infra, §249.

Cf. also Virginia, C. & I. Co. v. Louisville & N. R. Co., 98 Va. 776; 37 S. E. 310, (1900).

It would also seem to be immaterial that the shipper was ignorant of what the published rate really was.

Tex. & Pac. R. Co. v. Mugg, 202 U. S., 242, 245; 26 Sup. Ct. 628; 50 L. Ed. 1011, (428).

Southern Ry. Co. v. Harrison, 119 Ala. 539; 24 So. 552; 43 L. R. A. 385, (1898), overruling Mobile & O. R. Co. v. Dismukes, 94 Ala. 131; 10 So. 289; 4 Int. Com. Rep. 200, (1894).

Atchison, T. & S. F. R. Co. v. Holmes, 18 Okl. 92; 90 Pac. 22, (1907).

Gerber v. Wabash R. Co., 63 Mo. App. 145; 5 Int. Com. Rep. 458.

See, however, Standard Oil Co. v. U. S. 164 Fed. 376, (530-B).

And see infra, §348, as to intent in criminal cases.

(88) Gulf C. & S. F. R. Co. v. Hefley, 158 U. S. 98; 39 L. Ed. 910; 15 Sup. Ct. Rep. 802, (195).

See also Kizer v. Texarkana & F. S. R. Co., 179 U. S. 199; 21 Sup. Ct. Rep. 100; 45 L. Ed. 152, (1900).

Spratlin v. St. Louis S. W. R. Co., 76 Ark. 82; 88 S. W. 836, (1905).

St. Louis S. W. R. Co. v. Carden, 34 S. W. 145, (Tex. Civ. App.), (1896).

(89) Texas & Pac. R. Co. v. Mugg, 202 U. S. 242; 50 L. Ed. 1011; 26 Sup. Ct. Rep. 628, (428).

See also Merchants' Pr. Co. v. N. A. Ins. Co., 151 U. S. 368; 14 Sup. Ct. Rep. 367; 38 L. Ed. 195, (1894).

(90) Baltimore & O. R. Co. v. Hamburger, 155 Fed. 849, (531).

See also Ohio Coal Co. v. Whitcomb, 123 Fed. 359, 362; 59 C. C. A. 487, (315).

245 Same Subject—Claims on Account of Misrouting.

The lawful charge on any shipment is the tariff rate via the route over which the shipment actually moves, even where by another route, or by a combination of local charges, a lower rate is obtainable.[91] In case of misrouting the carrier cannot refund any part of the charge without the authority of the Commission or of a court having competent jurisdiction. By a general administrative ruling, however, the Commission has authorized carriers to return overcharges collected in this way.[92]

246. Same Subject—Agreements to Maintain Rates for a Fixed Period not Binding.

An agreement by a railroad with a shipper to carry his goods for a fixed period at the rates then in force, must yield to a subsequent increase in these rates on the filing of new tariffs, and in a prosecution for giving or receiving less than tariff rates it is no

Shiel v. Illinois Cent. R. Co., 12 I. C. C. Rep. 210, (**498**).

Wehmann v. Minneapolis, St. P. & S. S. M. R. Co., 58 Minn. 22; 59 N. W. 546, (1894).

Ward v. Missouri Pac. R. Co. 158 Mo. 226; 58 S. W. 28, (1900).

Griffin v. Wabash R. Co., 115 Mo. App. 549; 91 S. W. 1015, (1906).

Where, however, a passenger not properly entitled to a pass received and used one, stipulating for no liability on the part of the carrier in case of injury to him, it was held that he was nevertheless precluded from recovering against the railroad.

Duncan v. Maine Cent. R. Co., 113 Fed. 508, (1902).

And cf. Insurance Co. of N. A. v. Delaware, etc. Co., 91 Tenn, 537; 19 S. W. 755, (1892).

Mexican Cent. R. Co. v. Goodman, 43 S. W. Rep. 580; (Tex. Civ. App.), (1897).

(91) Tar. Circ. 15-A, Rulings No. 70 and 81.

Morgan v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 525, (**554**); (see infra, §265).

See also Flaccus Co. v. Cleveland C. C. & St. L. R. Co., 14 I. C. C. Rep. 333, (**699**).

If a shipper gives specific routing instructions the carrier is bound to follow them though a less rate applies by another route.

Larsen Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 286, (**610**).

Struthers Co. v. Penna. R. Co., 14 I. C. C. Rep, 291, 292, (**695**).

(92) Tar. Circ. 15-A, Ruling No. 70.

See also Admin. Rul. No. 25, (Jan. 6th, 1908).

Admin. Rul. No. 32, (Feb. 3d, 1908).

Admin. Rul. No. 91, (June 29th, 1908).

defense, either to a carrier or shipper, that the rates charged were in accordance with such contract.[93]

It would seem, however, that contracts made between carriers and shippers prior to 1887 might and should be complied with by them, although the observance of such contracts was in contravention of the provisions of the Act. The Circuit Court has specifically enforced an agreement made in 1871, whereby a carrier agreed to give a passenger an annual pass for life, in consideration of a release of damages incurred in an accident.[94]

247. Same Subject—The Chesapeake & Ohio Case.

A question somewhat analogous to that decided in the Armour cases is presented in the New York, N. H. & H. R. Co. *v.* I. C. C.,[95] known as the Chesapeake and Ohio case. This case involved the legality of a contract by which the Chesapeake & Ohio road agreed to sell and deliver to the New York, New Haven & Hartford, at New Haven, Connecticut, 2,000,000 tons of coal from its

(93) Armour & Co. v. U. S. 153 Fed. 1; 82 C. C. A. 135, (**476**-A); 209 U. S. 56; 52 L. Ed. 428; 28 Sup. Ct. Rep. 428, (**476**-B).

Chicago B. & Q. R. Co. v. U. S., 157 Fed. 830, (**542**).

Rhinelander Co. v. Northern Pac. R. Co. 13 I. C. C. Rep. 633, 636, (**654**).

In the case last cited, the Commission intimated that the contract, although non-enforceable, might be an indication of what was a reasonable rate.

See Western Or. Co. v. Southern Pac. R. Co., 14 I. C. C. Rep. 61, 70, 72, (**667**).

And cf. Laurel Cot. Mills v. Gulf & S. I. R. Co., 84 Miss. 339; 37 So. 134; 66 L. R. A. 453, (1904).

(94) Mottley v. Louisville & N. R. Co., 150 Fed. 406, (**451**-A).

The Supreme Court remanded this case with directions to dismiss the suit for want of jurisdiction, without passing on the question under the Interstate Commerce Act.

Louisville & N. R. Co. v. Mottley, 211 U. S. 149, (**451**-B).

See also Re St. Louis Millers' Asso., 1 I. C. C. Rep. 20, (**5**).

Wire Co. v. St. Louis R. Co., 38 Mo. App. 191.

But see Fitzgerald v. Fitzgerald Co., 41 Neb. 374; 59 N. W. 838, (1894).

Bullard v. Northern Pac. R. Co., 10 Mont. 168; 25 Pac. 120; 11 L. R. A. 246; 3 Int. Com. Rep. 536, (1890).

(95) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361; 50 L. Ed. 515; 26 Sup. Ct. Rep. 272, (**339**-B).

I. C. C. v. Chesapeake & O. R. Co., 200 U. S. 361; 50 L. Ed. 515; 26 Sup. Ct. Rep. 272, (**339**-B).

line as wanted, between July 1st, 1897, and July 1st, 1902, at $2.75 per ton. A failure to deliver 60,000 tons of this coal within the time specified, was adjusted by a new agreement, made in the spring of 1903, to deliver that amount at the same price. At the time of entering into the original agreement, and thereafter continuously up to the time the proceedings were begun, (except for certain brief periods) the market price of coal at the mines on the line of the Chesapeake & Ohio Railroad, added to the cost of transportation beyond this line,[96] was such that when these items were deducted from the contract price there was left only from 23 to 28 cents per ton, while the published freight rate of the Chesapeake & Ohio from the mines to Newport News was $1.45 per ton. During the entire period, the published rate was never as high as $2.75 per ton. The Circuit Court held that the carrying out of this contract did not constitute a violation of Sections 2 and 6 of the Act, but was a violation of Section 3. The Supreme Court held that the prohibition of the statute against either directly or indirectly charging less than published rates applied to this case, and that under this provision a carrier engaged in interstate commerce might not contract to sell and transport in completion of the contract a commodity sold, where the price stipulated in the contract was less than the cost of purchase, the cost of delivery, and the published freight rates.[97]

248. Same Subject—Significance of the Chesapeake & Ohio Decision.

Both the Supreme Court and a number of the Circuit Courts have held that the Interstate Commerce Act governs the railroads only in respect to their duties as common carriers.[98] The cases in which these decisions were rendered were cases in which the preference complained of was either given to one who was not at the same time a shipper or were cases in which the transportation charges were clearly separable from the subject-matter of the preference.

When a carrier hires all its refrigerator cars from one company,

(96) From Newport News to New Haven.

(97) The Court in this case said that it was immaterial that to adopt this construction of the Act made it impossible for the carrier to deal in articles produced along its line (p. 399).

(98) See supra, §§23 and 123.

even though that company be also a shipper, this neither directly violates the duty of the railroad under the Act to treat all alike in the performance of its duties as a common carrier, nor does it produce that result indirectly.[99] The service *qua* hirer of equipment in such a case is clearly separable from that *qua* carrier. The preference given in the former capacity is not a mere device to evade the Act, or one the natural consequence of which is to render the prohibition of Section 6 ineffectual. The decision in the Chesapeake & Ohio case holds that whenever a carrier contracts to do anything which consists in any part in transportation, the rates charged for the whole service must be such as to make it clear that the carrier is not losing anything on any branch of the transaction. This is merely another phase of the principle frequently enunciated by the Commission and the Circuit Courts in a different set of cases, involving the propriety of payments by carriers to shippers on account of services rendered by the latter. In such cases the transaction is always scrutinized most carefully, and the burden is on the carrier to show that the amount paid is not unreasonably high. Similarly, where a carrier, in addition to transporting goods, does something further for the shipper in another capacity, it must show that the charge for this additional service is not unreasonably low. If the amount paid the shipper for his services appears excessive, or if the charge for what the carrier does outside of transportation is unreasonably low, this constitutes a violation of Section 6.

249. Same Subject—Where no Through Rates are on File, the Combination of Local Tariff Rates Governs, both as to Carriers and Shippers.

Where the tariff filed is broad enough to cover a given service, the parties are bound thereby, even though the shipment be made in a manner not contemplated in the tariff filed, and under circumstances justifying the filing of a tariff prescribing a less charge, which might stand at the same time as the original tariff and not operate as a revocation or cancellation of it. Such a case arises where a through shipment is made to a point to which there is no through tariff rate, although there are on file local rates between the intermediate points. In such a case a shipper may reasonably

(99) Where the railroad pays the shipper more than a reasonable rental for his cars, the case is analogous to the one under discussion, and the facts are held to constitute an illegal "device." See supra, §162.

assume that if a through rate were in force it would be less than the sum of the local rates.[100] If then the carrier's agent agrees to take his freight at a lower rate than the combined tariff rates, the proceeding would be entirely legal, provided the carrier filed the through rate at a sufficient time before the goods were shipped, to allow the statutory period to elapse making the rate legal.[101] If the carrier neglected to file the through rate and allowed the shipment to go through at such rate, it would clearly be guilty of the offense of shipping at a rate not filed, or might reasonably be held to have departed from its published rate, but it would perhaps seem somewhat harsh to hold the shipper responsible merely because the carrier failed to file the new rate.[102] Although this argument would apply to a more or less extent to the whole idea of holding the shipper responsible, it is peculiarly forceful in cases like that here under discussion, where the published rate does not specifically apply to the shipment to be made. If there were no rate at all on file the carrier alone would be responsible for shipping goods without first filing a rate, and where no through rate is on file the case is very similar.

But to allow the shipper to escape responsibility for adherence to tariff rates on the ground that his shipment was made in a manner which would justify a lower rate than that which the ordinary shipper would pay for the service contemplated by the tariff filed, would open the door to so many easy methods of escape that no ingenious shippers could ever be convicted of receiving less than tariff rates. In spite of a decision in 1898, allowing a shipper to recover the difference between the sum of local rates filed and the amount of an agreed through rate not on file,[103] the recent decisions have all held that where there is no tariff through rate,

(100) See supra, §97 et seq.

(101) Prior to the Amendment of 1906 this was but three days; it is now thirty days. The cases, *infra*, in which shippers were held to the sum of the local rates, all arose prior to 1906.

(102) As to the necessity of knowledge by the shipper of the actual tariff rate in criminal cases, see infra, Chap. XXVII, §348.

(103) Pond-Decker Lumber Co. v. Spencer, 86 Fed. 846; 30 C. C. A. 430, (246).

In Armour v. U. S. 153 Fed. 1, 15; 82 C. C. A. 135, (476-A), the Court criticizes the Pond-Decker case, without seemingly appreciating the exact point therein involved.

Cf. also Parsons v. Chicago & N. W. R. Co., 63 Fed. 903; 11 C. C. A.

the legal rate is the sum of the published locals, and neither carrier [104] nor shipper [105] may depart therefrom. In Chicago, B. & Q. R. Co. *v.* U. S., [106] Judge Hook said:

"It is not essential to the commission of the offense of giving a concession from a through rate over connecting lines of railroad that the rate be a joint one established by all of the carriers and published and filed with the Commission. If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transpor-

489; 27 U. S. App. 394, (**188**-A); 167 U. S. 447; 42 L. Ed. 232; 17 Sup. Ct. Rep. 887, (**188**-B).

Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 94-98, (**173**).

(104) Tar. Circ. 15-A, pp. 10-11.

Circular of Mar. 23rd, 1889, 2 I. C. C. Rep. 656.

St. Louis H. & G. Co. v. Illinois Cent. R. Co., 11 I. C. C. Rep. 436, (**410**).

Re Through Routes & Rates, 12 I. C. C. Rep. 163, 168-169, (**489**).

Poor Grain Co. v. Chicago B. & Q. R. Co., 12 I. C. C. Rep. 418, 469, (**528**).

U. S. v. Great Nor. R. Co., 157 Fed. 288, (**490**).

Chicago B. & Q. R. Co. v. U. S., 157 Fed. 830, (**542**).

(105) U. S. v. Wood, 145 Fed. 405, 409-410, (**423**).

U. S. v. Camden Iron Works, 150 Fed. 214, (**449**-A); (overruled, but on a different ground, 158 Fed. 561), (**449**-B).

Armour v. U. S., 153 Fed. 1; 82 C. C. A. 135, (**476**-A); (with additional facts stated in C. B. & Q. R. Co. v. U. S., 157 Fed. 830), (**542**).

Affirmed 209 U. S. 56; 52 L. Ed. 428; 28 Sup. Ct. Rep. 428, (**476**-B), without discussion of this point.

U. S. v. Standard Oil Co., 155 Fed. 305, 312, (**530**-A); reversed, 164 Fed. 376, (**530**-B), but not on this point.

An indictment in such a case must specifically negative the filing of a through rate less than the sum of the locals, and a charge in accordance therewith.

U. S. v. Standard Oil Co., 148 Fed. 719, 727. (**447**).

(106) 157 Fed. 830, 833, (**542**).

tation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end is taken they in effect adhere to the rates established, published, and filed by them as applying not only to local but to through traffic. The initial carrier which receives traffic and issues a bill of lading to ultimate destination should be held to have done so in view of the only rates which its connections are authorized by law to charge."

Where a through rate is on file, the carrier must charge this rate on through shipments, and may not ship through at the sum of the locals, even though this be less than the through rate.[107]

250. Same Subject—Tariff Rates via a Given Route Govern Shipments by Other Routes as to which no Tariffs are on File.

(See also supra, §245, as to claims for misrouting, where rates are on file over several routes).

A question similar to that discussed in the preceding section arose in the cases of U. S. *v.* Vacuum Oil Co.[108] and U. S. *v.* Penna. R. Co.[109] Both these cases involved the same facts. The Vacuum Oil Co. desired to make shipments from Olean, N. Y., to Rutland, Vt. There was on file a joint through rate, filed by the Pennsylvania Railroad, over a route composed of the Pennsylvania Railroad as initial carrier, the New York Central and Hudson River Railroad, the Boston & Maine Railroad, and the Rutland Railroad, specifying a petroleum rate of 19 cents per 100 pounds. While this rate was in force the oil in question was shipped by the Pennsylvania Railroad over another route, com-

(107) Tar. Circ. 15-A, No. 81.

Morgan v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 525, (**554**).

In such a case the shipper might, of course, ship locally to himself at the junction point, and then reship, and thus take advantage of the local rates, (see supra, §34). The Commission said, however, in the case last cited, that the carrier or its employes might not properly act as agent for this purpose (p. 528).

The same conclusion has been stated in a recent Conference Ruling, (Oct. 13th, 1908).

(108) 153 Fed. 598, (**468**).

(109) 153 Fed. 625, (**470**).

posed of its own line, the New York Central and the Rutland Railroad, at 16.1 cents. It was not alleged that there was no through rate on file over the latter route. Both carrier and shipper were held guilty, the one of giving, and the other of receiving less than published rates. In Vacuum Oil case, Judge Hazel stated the point decided as follows:

"In other words, the initial carrier, when it has once established a joint traffic compact to transport property over a certain route between points in different States, cannot transport over any connecting route pursuant to traffic arrangements at a less rate than that published and filed in conformity with the traffic act." [110]

As applied to a carrier, this rule is not extreme, but as applied to shippers it would seem to go rather far.

A similar question would be presented if no carload rate covering a given commodity were on file. In such a case a carload shipper might consider himself justified in accepting a less rate than that allowed shippers in less-than-carloads, but under the foregoing decisions he would seem to be bound to the rate filed until he saw to it that the carrier established a carload rate in the manner prescribed by Section 6. In the Vacuum Oil Company case Judge Hazel said (p. 604):

"It is not controverted that there are occasions when a reasonable departure in rates is permissible, as, for instance, when the conditions of shipment are essentially different."

He held, however, that the fact that the shipment in question was in bulk and in a car not owned by the railroad, did not exonerate the accused. The dictum quoted would seem to be somewhat inconsistent with the main point decided in the case.[111]

(110) 153 Fed. 598, 602, (**468**).

But see Stedman v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 167, (**592**), and Larsen Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 286, (**610**), where the Commission held that when a through rate of 25c. was filed over one route between two points, and over another route by the same initial and delivering carrier between the same points there was no through rate filed, on a shipment over the latter route the carriers could not lawfully charge any rate but the sum of the locals. This decision was doubtless just on the facts, but would seem difficult to reconcile with the Federal decisions above cited.

See also U. S. v. Vacuum Oil Co., 158 Fed. 536, (**572**).

(111) Compare Missouri, K. & T. R. Co. v. Bowles, 1 Ind. Terr. 250; 40 S. W. 899, (1897), where it was held that when a tariff rate existed applicable to "hay," the carrier might not properly allow a lower rate on "old hay."

CHAPTER XX.

THE COMMODITIES CLAUSE.

251. Provision of the Act.
252. Constitutionality of the Provision.
253. Scope of the Provision.

251. Provision of the Act.

The Hepburn Amendment introduced into Section 1 the paragraph commonly known as the Commodities Clause. This provision is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

252. Constitutionality of the Provision.

The foregoing provision has been declared unconstitutional by the Circuit Court for the Eastern District of Pennsylvania, as applied to the Delaware & Hudson Co., the Erie Railroad Co., the Central Railroad of New Jersey, the Delaware, Lackawanna & Western R. Co., the Pennsylvania R. Co., and the Lehigh Valley R. Co., in the transportation of coal owned by them in pursuance of their charters, or owned by coal companies controlled by them or in which they held stock.[1] This case was heard before Circuit Judges Gray, Dallas, and Buffington. Judge Gray delivered the opinion of the majority of the Court. The basis of his decision was as follows:

The defendants had not only been authorized by their charters, but encouraged by the laws of Pennsylvania, to invest their property in coal lands or in the stock of coal companies. The right to

(1) United States v. Delaware & H. Co., et al., 164 Fed. 215, (713).

transport such coal to market was an essential incident of the value of the property so acquired, and to prohibit the transportation of the coal or to require its sale would be so injurious to defendants' interest in the property as to amount to a confiscation thereof. The right of the Congress to regulate interstate commerce did not include the right to prohibit such commerce under all circumstances, but only in cases where the prohibition was a reasonable one and where its exercise did not offend the provisions of the Fifth Amendment or amount to a confiscation of property. The question as to whether a given regulation of commerce was reasonable or amounted to a confiscation forbidden by the Fifth Amendment was for the Courts. In the present case, the prohibition was unreasonable and confiscatory, and therefore unconstitutional.

Judge Buffington dissented from the majority, holding that the divorce of the dual relation of public carrier and private transporter was a regulation of commerce which, under the Constitution, Congress had the power to make, and that the wisdom of this regulation was not a subject of judicial scrutiny.

Neither the majority nor the dissenting Judge seem to consider the possibility of complying with the Act by distribution of the stock of the coal companies among the stockholders of the railroads. This would eventually sever the unity of control and would not necessitate a forced sale. Practically the only value sacrificed would be the depreciation necessarily resulting from the fact that the monopoly was broken. The Delaware & Hudson and Delaware, Lackawanna & Western might organize corporations to which to turn over their coal lands, receiving stock which they could distribute to their own stockholders.

The real object of the Commodities Clause, as regards railroads already owning coal lands or stock in coal companies, was evidently to force the sale of the lands or stock. There can be no doubt that Congress would not have had power under the commerce clause to accomplish this result by direct legislation. It may be suggested that the constitutionality of this Act must therefore be tested on the assumption that the carriers would not do what Congress had no power directly to compel them to do, and that the only question was whether Congress could prevent these railroads from transporting their coal to market. If the possibility of a sale of the coal lands without unreasonable sacrifice be

eliminated, the Act would seem clearly to amount to a confiscation of the coal, which was obviously valueless except at points where the defendants' roads alone could take it.

On appeal this case is pending before the Supreme Court.

253. Scope of the Provision.

The Commodities Clause prohibits the transportation not only of commodities owned by the carrier, but also of those in which it has an interest, direct or indirect. The ownership of stock in a coal company amounts to such an indirect interest, and renders it a violation of the Act for a carrier to transport coal owned by a company in which it is a stockholder.[2]

Where a carrier owns a majority of stock in a coal company, the Act prohibits the transportation of coal mined by the latter company, although such coal be sold to third persons at the mines and although neither the carrier nor the coal company controlled by it has any interest, direct or indirect, in the coal at the time of the transportation, apart from the obligation and right of the common carrier in the transportation thereof.[3]

(2) Central Trust Co. v. Pittsburg, S. & N. R. Co. et al., 101 N. Y. Supp. 837, (1906).

United States v. Delaware & H. Co., 164 Fed. 215, (713).

(3) United States v. Delaware & H. Co., 164 Fed. 215, (713).

CHAPTER XXI.

AGREEMENTS FOR POOLING OF FREIGHTS OR DIVISION OF EARNINGS.

254. Provisions of the Act.
255. Section 5 Comparatively Unimportant Since the Passage of the Sherman Act.
256. Definitions of a Pool.
257. Decisions under Section 5.

254. Provisions of the Act.

Section 5 of the Act is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

255. Section 5 Comparatively Unimportant Since the Passage of the Sherman Act.

The Interstate Commerce Act was passed in 1887, prior to the passage of the Sherman Anti-Trust Act of July 2, 1890. The latter statute is very much broader in its application than Section 5 of the Interstate Commerce Act, forbidding many combinations not covered by the Commerce Act, besides covering every case to which it is applicable. This circumstance renders Section 5 comparatively important, since practically all proceedings to prevent pools are brought under the Anti-Trust Act.[1] In a few cases, however, this section has been passed upon by the Commission and by the Courts.[2]

(1) Cf. U. S. v. Trans-Missouri Frt. Asso., 58 Fed. 58, 93; 7 C. C. A. 15; 24 L. R. A. 73, (1893); 166 U. S. 290; 17 Sup. Ct. 540; 41 L. Ed. 1007, (1897); where Section 5 was discussed by the Circuit Court but not referred to by the Supreme Court.

(2) The Commission would not seem to have approved of the policy of Congress in absolutely prohibiting all combination or cooperation by

256. Definitions of a Pool.

In I. C. C. *v.* Southern Pac. R. Co.,[3] Judge Wellborn gave the following definition of a pool:

"Any contract, agreement or combination between different and competing railroads, whereby the volume and quantity of freights each or any shall receive for transportation is to be determined by or through any conventional means or agency which was intended to and does suppress competition, either in rate or service or competition directly addressed to shippers, is a traffic pool, within the meaning of Section 5 of the Commerce Act."

The judgment of the Court in this case, however, holding that the facts there presented constituted a pool, was reversed by the Supreme Court,[4] thus making the foregoing definition somewhat unreliable.

In his charge to the Grand Jury in Re-Pooling of Freights,[5] Judge Hammond said:

"The statute contemplates two methods of pooling, both of which are prohibited: First, a physical pool, which means a distribution by the carriers of property offered for transportation among different and competing railroads in proportions and on percentage previously agreed upon; and, secondly, a money pool, which is described best in the language of the statute, 'to divide between them (different and competing railroads) the aggregate or net proceeds of the earnings of such railroads, or any portion thereof.' . . . . Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, comes within the inhibition of the act to regulate commerce."

257. Decisions Under Section 5.

The Commission has held that a division of passengers is not forbidden, Section 5 applying only to a division of freights, or of

competing lines.

See 1st Ann. Rep. 1 I. C. C. Rep. 309-311 et seq.; 14th Ann. Rep. 6; 12th id. 10-22.

The Cullom Committee also considered the question of pooling and declined to recommend a section in the original Act prohibiting it. See Cullom Report, p. 200.

(3) 132 Fed. 829, 846, (302-C).

(4) Southern Pac. R. Co. v. I. C. C., 200 U. S. 536; 26 Sup. Ct. 330; 50 L. Ed. 585, (302-E).

(5) 115 Fed. 588, 589, (1902).

the earnings from freights or passengers.[6] "Freights" refers to the commodities themselves and not to the compensation for their carriage.[7]

The Section forbids not merely an actual division of earnings, but also a contract to divide them.[8]

Pools and pooling agreements are forbidden only between competing railroads and Section 5 does not render invalid or illegal a stipulation by an initial carrier reserving to itself the right to route the traffic beyond its own line, although the result of such stipulation is in a measure to suppress the competition among the connecting lines, by giving to the initial road the power to divide the traffic among them in such proportions as it sees fit.[9]

The Commission has held that a system of fines and penalties adopted by competing roads amounted to a pool.[10]

Prior to the Amendment of 1906 the Act did not prohibit a pool between Express Companies,[11] or between a railroad and a pipe line company.[12] This Amendment, however, makes such companies expressly subject to the Act.

(6) Re Transportation of Immigrants, 10 I. C. C. Rep. 13, (**334**).

(7) I. C. C. v. Southern Pac. R. Co., 132 Fed. 829, 838-840, (**302**-C); (reversed by the Supreme Court, 200 U. S. 536; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302**-E), but not on this point).

(8) I. C. C. v. Southern Pac. R. Co., 132 Fed. 829, 837, (**302**-C); (reversed by the Supreme Court, 200 U. S. 536; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302**-E), but not on this point).

(9) Southern Pac. R. Co. v. I. C. C., 200 U. S. 536; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302**-E); (reversing 132 Fed. 829, (**302**-C); and 123 Fed. 597, (**302**-B); 10 I. C. C. Rep. 590, 615; (**371**); and 9 I. C. C. Rep. 182), (**302**-A).

(10) Cincinnati Fr. Bur. v. Cincinnati N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 253-255, (**183**-A).

See also Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. 85, 111, (**173**).

(11) Re Express Companies, 1 I. C. C. Rep. 349, 368, (1887).

(12) Independent Ref. Asso. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 459-460, (**155**-A).

CHAPTER XXII.

SWITCH CONNECTIONS.

258. Provisions of the Act. 259. Construction of the Provision.

(As to discrimination cases in connection with the allowance of switch connections see supra §178.)

258. Provisions of the Act.

At Common Law, the carrier was not bound to construct a spur track for a shipper located near its line.[1]

The last paragraph of Section 1 of the Act provides as follows:

"Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter

(1) See Jones v. Newport News & M. V. Co., 65 Fed. 736; 13 C. C. A. 95, (1895).

Mercantile Tr. Co. v. Columbus S. & H. R. Co., 90 Fed. 148, (1898),

provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

Under Section 3, the Commission has power to correct discriminations in reference to switch connections, as in the case of other facilities, where such are refused to a particular shipper although allowed his similarly situated competitors.[2]

259. Construction of the Provision.

The provision of the Act above quoted does not give the Commission plenary discretion as to the advisability of the connection desired. The Commission may order a connection only under the circumstances and conditions specified in the Act.[3]

Under the above provision of the Amended Act, application in writing to the carrier by the shipper desiring the switch is a pre-requisite to obtaining relief from the Commission.[4]

The Commission has held that short branch line railroads may secure connections under this provision, as well as individual shippers,[5] but has said that it does not follow that all branch railroad lines having switch connections with a main line are entitled to joint rates.[6] The Circuit Court for the Southern District of New York, however, (Judges Lacombe, Ward, and Noyes) has recently granted a preliminary injunction to restrain the enforce-

(2) See supra, §178.

(3) Rahway Val. R. Co. v. Delaware, L. & W. R. Co., 14 I. C. C. Rep. 191, (**683**-A).

See also McCormick v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 611, (**724**).

(4) Barden v. Lehigh V. R. R. Co., 12 I. C. C. Rep. 193, 195, (**493**). Here the Commission said that the carrier had not the right to determine what commodities should be moved over a private switch except in so far as was necessary to protect it from fire, explosions, etc.

See also Delaware, L. & W. R. Co. v. I. C. C., 000 Fed. ——, (**683**-B).

(5) McRae Terminal Ry. v. Southern Ry., 12 I. C. C. Rep. 270, 545, (**510**). In this case three of the Commissioners dissented, seemingly on the ground that the real object of the petition was to secure divisions of through rates by a particular shipper by means of the ownership of the complainant company.

Rahway Val. R. Co. v. Delaware, L. & W. R. Co., 14 I. C. C. Rep. 191, 194, (**683**-A).

(6) Rahway Val. R. Co. v. Delaware, L. & W. R. Co., 14 I. C. C. Rep. 191, 194, (**683**-A).

ment of the order of the Commission in the Rahway Valley Railroad case, above cited, on the ground that although under Section 1 application in writing for a switch connection is properly made by a branch road as well as by a shipper, the provision further on in the Section for hearing and investigation by the Commission specifies only the shipper as the proper complainant. The court stated that probably this omission was an oversight on the part of Congress, but as there was no provision for application or complaint by a lateral branch line, the Commission was without power to make the order where such a branch line was the only moving party.[7]

Ordinarily, the Commission will leave the precise location of the switch to the discretion of the carrier, and will prescribe such location only where the parties cannot come to an understanding.[8]

(7) Delaware, L. & W. R. Co. v. I. C. C., 000 Fed. ——, (683-B).

(8) McRae Term. Ry. v. Southern Ry. Co., 12 I. C. C. Rep. 270, 274, (510).

CHAPTER XXIII.

LIMITATION OF LIABILITY AND LOSSES BEYOND THE CARRIER'S LINE.

260. Provisions of the Act.
261. Constitutionality of the Provision.
262. Construction of the Provision.

260. Provisions of the Act.

The last two paragraphs of Section 20, as amended by the Carmack Amendment to the Hepburn Act, provide as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

261. Constitutionality of the Provision.

The above provision, making a carrier liable beyond its own line and prohibiting exemption from liability by contract, has been declared constitutional, as not unduly interfering with the liberty of contract, or depriving the carrier of its property without due process of law.[1] This case was decided before the decision by

(1) Smeltzer v. St. Louis & S. F. R. Co., 158 Fed. 649, (588).

the Supreme Court in Adair *v.* U. S.[2] was accessible to Judge Rogers. A different decision may well be reached when the question comes before the Supreme Court.

In a case decided by the Virginia Court of Appeals on January 14, 1909, the Court declined to pass on the constitutionality of the provision, holding that, in the case presented, the negligence of the connecting line was in the capacity of warehouseman and not of carrier and that the Carmack Amendment did not render the initial carrier liable in such a case, where bill of lading provided against such liability.[3] This case will probably be taken to the Supreme Court of the United States.

262. Construction of the Provision.

In Re Released Rates,[4] the Commission, in response to numerous requests for an administrative interpretation of that part of Section 20 above quoted, expressed at length its views concerning the legal effect of these provisions. Its conclusions are summarized on page 561 of the opinion as follows:

I. If a rate is conditioned upon the shipper's assuming the risk of loss due to causes beyond the carrier's control, the condition is valid.

II. If a rate is conditioned upon the shipper's assuming the entire risk of loss, the condition is void as against loss due to the carrier's negligence or other misconduct.

III. If a rate is conditioned upon the shipper's agreeing that the carrier's liability shall not exceed a certain specified value—

(a) The stipulation is valid when loss occurs through causes beyond the carrier's control.

(b) The stipulation is valid, even when loss is due to the carrier's negligence, if the shipper has himself declared the value, expressly or by implication, the carrier accepting the same in good faith as the real value, and the rate of freight being fixed in accordance therewith.

(c) The stipulation is void as against loss due to the carrier's

(2) 208 U. S. 161, (1908).

(3) Norfolk & W. R. Co. v. Stuart's Draft Milling Co., —— Va. ——.

(4) 13 I. C. C. Rep. 550, (**642**).

See also Smeltzer v. St. Louis &. S. F. R. Co., 158 Fed. 649, (**588**).

Ullman v. Adams Ex. Co., 14 I. C. C. Rep. 340, (**701-A**).

negligence or other misconduct if the specified amount does not purport to be an agreed valuation, but has been fixed arbitrarily by the carrier without reference to the real value.

(d) The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount.

PART II.

The Enforcement of the Act.

CHAPTER XXIV.

THE COMMISSION, ITS NATURE, POWERS AND DUTIES.

263. The Status and Functions of the Commission—Stare decisis.
264. Powers of the Commission—None except those Prescribed by the Act.
265. Same Subject—Power to Award Damages for Misrouting.
266. Exclusive Power to Alter or Question Reasonableness of Published Tariffs.
267. Power to Regulate Physical Operation—No Such Power Prior to Hepburn Amendment.
268. Same Subject — Effect of Hepburn Amendment.
269. Same Subject—Location of Stations.
270. Power to Fix Rates—Early Commission Decisions.
271. Same Subject—Decisions by the Courts Prior to the Amendment of 1906—I. C. C. v. Cincinnati N. O. & T. P. R. Co., 167 U. S. 479.
272. Same Subject—Commission and Court Decisions Subsequent to I. C. C. v. Cincinnati N. O. & T. P. R. Co., and Prior to the Hepburn Amendment.
273. Same Subject—Effect of the Hepburn Amendment.
274. The Commission has no Power to Order an Increase in Rates.
275. Power to Prescribe Through Routes and Joint Rates—Decisions Prior to the Hepburn Amendment.
276. Same Subject—Effect of the Hepburn Amendment—Attitude of the Commission.
277. Same Subject—What Constitutes a Reasonable and Satisfactory Through Route.
278. Same Subject—Power to Regulate Interchange of Equipment.
279. Same Subject—Divisions of Joint Rates among Carriers.
280. Power to Award Damages.
281. Power over Regulations Affecting Rates.
282. Regulation of Charges for Incidental Services.
283. Allowances to Shippers for Services.
284. Regulation of Publication of Tariffs.
285. Powers of Investigation.
286. Issuing General Orders.
287. Power to Alter or Modify its Own Orders.
288. Criminal Proceedings.
289. Expenses of the Commission.

262. Status and Functions of the Commission—Stare Decisis.

The Interstate Commerce Commission is a body corporate, with legal capacity to be a party plaintiff or defendant in the Federal Courts.[1] Its functions are in their nature both quasi-judicial and administrative. As a Court, it passes on the reasonableness of rates and practices; as an administrative body, it supervises the publication of rates and collects and publishes statistics with reference to the management of railroads. Investigations conducted before the Commission are not, however, "judicial proceedings," as that term is used with reference to Courts of general jurisdiction, in the general administration of justice.[2] Neither is the Commission an "inferior court," whose members are required by the Constitution to be retained in office "during good behavior."[3]

In Page *v.* Delaware, L. & W. R. Co.,[4] the Commission said:

"The Commission is not a Court; it is a special tribunal continually engaged in an administrative and semi-judicial capacity in investigating railway rates and practices."

Although the Commission does not regard itself as bound by its prior decisions in the way that a Court does,[5] yet when it has de-

(1) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 204; 16 Sup. Ct. Rep. 666; 40 L. Ed. 940, (**122**-D).

(2) I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 414, (**156**-B). See also Toledo Pr. Exch. v. Lake S. & M. S. R. Co., 5 I. C. C. Rep. 166, 176, (**146**).

And cf. Brockway v. Ulster & D. R. Co., 8 I. C. C. Rep. 21, 24, (**255**).

(3) Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 611; 2 L. R. A. 289, (**57**-B).

See also re Rates on Food Products, 4 I. C. C. Rep. 116, 119, (**106**).

(4) 6 I. C. C. Rep. 548, 553, (**180**-C).

(5) See Brockway v. Ulster & D. R. Co., 8 I. C. C. Rep. 21, 24, (**255**). Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co., 12 I. C. C. Rep. 507, 514, (**399**-B).

The principle of *stare decisis* is not really applicable to most decisions by the Commission, for a rate or rate relation which is reasonable at one period may, under changed conditions, become unreasonable at a subsequent time. See also supra, §84.

In the case last cited the Commission stated that the decree of the Supreme Court, refusing to enforce an order issued by it prior to June 29th, 1906, was not a bar to its subsequent investigation of the matters covered thereby.

See also Kansas City H. D. Asso. v. Missouri Pac. R. Co., 14 I. C. C. Rep. 597, 600-601, (**723***).

termined on a proper relation of rates between given localities, it requires strong evidence to induce it to disturb this relation.[6]

It would appear that the Commission does not feel itself bound on all occasions to follow the decisions of the Federal Courts, even as regards the interpretation of the provisions of the Interstate Commerce Act. It will of course accept the law as explicitly announced by the Supreme Court, and will follow the directions of the Circuit Courts in particular cases, yet on a number of occasions it has ignored or repudiated the construction of the Act laid down by the lower Federal tribunals, and has followed instead its own interpretation of the Statute.[7]

264. Powers of the Commission[8]—None Except Those Prescribed by the Act.

All the powers of the Commission are derived from the Interstate Commerce Act and the Amendments thereto and no powers

(6) Kansas Bd. of R. Comr's. v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 304, 308-9, (**268**).

Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co., 10 I. C. C. Rep. 83, 106-7, (**245**-F).

Howard Mills Co. v. Missouri Pac. R. Co., 12 I. C. C. Rep. 258, 263, (**508**).

Haines v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 214, 217, (**599**).

And cf. Re Relative Tank and Bbl. Rates on Oil, 2 I. C. C. Rep. 365, (**65**).

Nicola Co. v. Louisville & N. R. Co., 14 I. C. C. Rep. 199, 205, (**685**).

In Banner Milling Co. v. New York Cent. & H. R. R. Co., 14 I. C. C. Rep. 398, 400, (**567**), Commissioner Prouty said:

"While there is in the nature of things no estoppel of record in proceedings before this body, the Commission must of necessity, when it reaches a conclusion upon a given state of facts, adhere to that conclusion in subsequent proceedings unless some new facts or changed conditions are brought to its attention or unless it proceeded upon some misconception in reaching the original decision."

(7) See supra, §198.

Also Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 453, 477-478, (**200**).

Cattle Raisers' Asso. v. Fort Worth & D. C. R. Co., 7 I. C. C. Rep. 513, 554-555, (**245**-A).

California Com. Asso. v. Wells Fargo & Co., 14 I. C. C. Rep. 422, 430, (**706**).

Export Sh. Co. v. Wabash R. Co., 14 I. C. C. Rep. 437, (**707**).

And cf. supra, §103.

(8) See Re Rates on Food Products, 4 I. C. C. Rep. 116, 119, (**106**), et seq, (1890), for a general statement by the Commission as to its

can be exercised by it which are not expressly or by plain implication conferred thereby.[9] It has no power to enforce the provisions of a State Constitution requiring connections between different roads.[10] It cannot regulate the reception of immigrants nor interfere directly or indirectly with the special Board appointed by Congress for that purpose.[11] It cannot compel a railroad to enter into or continue an arrangement with a Travellers' Union regarding the carriage of free baggage for its patrons in return for certain guarantees.[12] Nor can it prevent railroads from influencing the selling price of commodities by means other than rates.[13]

The Commission has no power to allow special privileges [14] or to relieve hardships,[15] except as provided by the Act. It cannot require a classification committee to place given articles in a certain class.[16] Nor has it power to prevent anticipated violations of the Act, except as specifically authorized. It will not therefore assume advisory jurisdiction or give an opinion on a question not yet the subject of controversy,[17] except perhaps to the head of a department of the Government.[18]

powers and function.

The Commission will, of its own motion, dismiss a case where lack of jurisdiction is apparent.

Chandler Co. v. Fort S. & W. R. Co., 13 I. C. C. Rep. 473, (**633**).

Hussey v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 366, (**621**).

(9) In Re Chicago, St. P. & K. C. R. Co., 2 I. C. C. Rep. 231, 253, (**58**).

Haines v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 214, 217, (**599**).

(10) Kentucky R. Com. v. Louisville & N. R. Co., 10 I. C. C. Rep. 173, 191, (**343**).

(11) Savery & Co. v. New York, C. & H. R. R. Co., 2 I. C. C. Rep. 338, (**63**).

(12) Traders' & Tr. Un. v. Phila. & R. R. Co., 1 I. C. C. Rep. 122, (**18**).

(13) Independent Ref. Asso. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 461, (**155-A**).

(14) Re St. Louis Millers' Asso., 1 I. C. C. Rep. 20, (**5**).

(15) Re Iowa Steel Barb Wire Co., 1 I. C. C. Rep. 17, 19, (**4**).

(16) McMillan v. Western Cl. Com. 4 I. C. C. Rep. 276, (**118**).

(17) Re Order of Ry. Conductors, 1 I. C. C. Rep. 8, (**2**).

Holbrook v. St. Paul, M. & M. R. Co., 1 I. C. C. Rep. 102, (**15**).

Bishop v. Duval, 3 I. C. C. Rep. 128, (1889).

(18) Re Indian Supplies, 1 I. C. C. Rep. 15, (**3**).

Cf. however, Re Disabled Soldiers and Sailors, 1 I. C. C. Rep. 28, (**11**).

In one decision the Commission intimated that it had no right to question the power of Congress to regulate certain traffic.[19]

265. Same Subject—Power to Award Damages for Misrouting. The Commission in several cases has awarded damages for failure to ship by a route designated by the shipper.[20] It would seem difficult to find any provision of the Act of which this is a violation. It would appear to be merely a common law duty. The question as to the Commission's jurisdiction in such cases would never seem to have been raised.

Unless, however, the Commission could award damages in such cases, the shipper might have difficulty in securing reparation, for the Courts might possibly hold that, since the charges exacted were in accordance with the published tariffs, they had no authority to award damages which would in effect secure to the shipper a lower rate than that filed.[21]

Where goods have been misrouted or where, through some other similar fault of the carrier, the shipper has been required to pay charges in excess of those to which he should properly have been subjected, the Commission has directed or given authority for the refund of the excess.[22]

(19) Re Investigations of Trans. by Gr. Tr. R. Co., 3 I. C. C. Rep. 89, 101, (78).

(20) Pankey v. Richmond & D. R. Co., 3 I. C. C. Rep. 653, (102).
Dewey v. Baltimore & O. R. Co., 11 I. C. C. Rep. 481, 483, (409).
Hennepin Paper Co. v. Northern Pac. R. Co., 12 I. C. C. Rep. 535, (556).
Flaccus Co. v. Cleveland, C. C. & St. L. R. Co., 14 I. C. C. Rep. 333, (699).
McCaull Co. v. Chicago G. W. R. Co., 14 I. C. C. Rep. 528, (1908).
Cedar Hill Coal Co. v. Colorado & S. R. Co., 14 I. C. C. Rep. 606, (1908).
See also as to the duty of carriers with regard to the routing of freight,
Newland v. Northern Pac. R. Co., 6 I. C. C. Rep. 131, (179).
Rea v. Mobile & O. R. Co., 7 I. C. C. Rep. 43, 53, (216).
Poor Gr. Co. v. Chicago, B. & Q. R. Co., 12 I. C. C. Rep. 418, 424, 469, (528).
Post v. Southern Ry. Co., 103 Tenn. 184; 52 S. W. 301, (1899).

(21) See supra, §§240-243, infra, §§266, 309.
See also Tar. Circ. 15-A, Ruling No. 70; Admin. Rul. No. 32.
In such a case it would seem, however, that a Court would have jurisdiction in an action on the case for negligence.

(22) See Tar. Circ. 15-A, Rulings Nos. 70, 74, 81; Admin. Rul. Nos. 25, 27, 31, 32, 61, 69, 83, 91, 94.

266. Exclusive Power to Alter or Question Reasonableness of Published Tariffs.

In certain respects the power and jurisdiction of the Commission is exclusive. It alone can entertain proceedings for the alteration of an established schedule.[23]

267. Power to Regulate Physical Operation—No Such Power Prior to Hepburn Amendment.

The Commission, prior to the Amendment of 1906, had no power to direct or regulate the physical operation of railroads. Since that Amendment its powers in this respect are confined strictly to those expressly given. It cannot compel a carrier to stop reckless expenditure.[24] Nor can it award damages for defective service[25] or for failure to make schedule time[26] or for breach of contract[27] or for conversion of chattels.[28] It cannot impose on a railroad an arrangement for reciprocal demurrage with shippers;[29] nor can it require a road to adopt a particular

(23) Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; 51 L. Ed. 553; 27 Sup. Ct. Rep. 350, (**454**).
Supra, §§240-243, and infra, §309.

(24) Shamberg v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 630, 660, (**127**).
Milk Prod. Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 164, (**220**).

(25) Duncan v. Atchison, T. & S. F. R. Co., 6 I. C. C. Rep. 85, 92, (**173**).
General Elec. Co. v. New York Cent. & H. R. R. Co., 14 I. C. C. Rep. 237, 242, (**689**).
See, however, supra, §265.

(26) Loud v. South Car. R. Co., 5 I. C. C. Rep. 529, 543, (**161**).

(27) Eddleman v. Midland Val. R. Co., 13 I. C. C. Rep. 103, 104, (**579**).
See also Omaha Com. Cl. v. Chicago & N. W. R. Co., 7 I. C. C. Rep. 386, 401, (**240**).
La Salle R. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 610, (**651**).

(28) MacBride v. Chicago, St. P., M. & O. R. Co., 13 I. C. C. Rep. 571, (**644**).

(29) Mason v. Chicago, R. I. & Pac. R. Co., 12 I. C. C. Rep. 61, (**465**).
Cf. Yazoo & M. V. R. Co. v. Keystone Co., 43 So. Rep. 605.
Stone v. Atlantic C. L. R. Co., 56 S. E. 932.

method for computing charges,[30] or to sell a particular kind of ticket,[31] or to adopt a particular form of bill of lading.[32]

Prior to the Amendment of 1906, at least, the Commission could not require carriers to provide a particular kind of car,[33] or to receive and haul them over its tracks,[34] or to use, at greater risk to itself, for given traffic, a kind of car especially suitable to certain of its patrons.[35] Prior to the Hepburn Act it could not compel a carrier to put in a siding for a particular shipper.[36]

268. Same Subject—Effect of Hepburn Amendment.

The Amendment of 1906 makes it the duty of the carrier, under Section 1, to provide cars and facilities for shipment and to furnish refrigeration, etc.[37] Whether this provision gives the Commission power to require the carrier to furnish a particular kind of car would seem to be open to grave doubt.[38] It certainly im-

(30) Re Transportation of Fruit, 11 I. C. C. Rep. 129, 141, (**357**-B). See, however, Par. 5 of Section 20, as amended in 1906.

(31) Sprigg v. Baltimore & O. R. Co., 8 I. C. C. Rep. 443, 451, (**279**). Field v. Southern R. Co., 13 I. C. C. Rep. 298, (**613**).

(32) Re Bills of Lading, 14 I. C. C. Rep. 346, 349, (1908).

(33) Scofield v. Lake Shore & M. S. R. Co., 2 I. C. C. Rep. 90, 116, (**51**).
Rice v. Cincinnati, W. & B. R. Co., 5 I. C. C. Rep. 193, 212, (**147**). Re Transportation of Fruit, 10 I. C. C. Rep. 360, 373, (**357**-A).

(34) Worcester Car. Co. v. Penna. R. Co., 3 I. C. C. Rep. 577, (**97**).

(35) New Orleans Cot. Exch. v. Illinois Cent. R. Co., 3 I. C. C. Rep. 534, 569, (**96**).

(36) Red Rock Fuel Co. v. Baltimore & O. R. Co., 11 I. C. C. Rep. 438, 450, (**404**).
See supra, Chap. XXII, as to effect of Hepburn Act.

(37) The last clause of the 2nd par. of Section 1, is as follows:
". . . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

(38) See Jones v. St. Louis & S. F. R. Co., 12 I. C. C. Rep. 144, 150, (**484**).
Section 12 provides that "The Commission is hereby authorized and

poses on the carrier a statutory duty, in addition to its common law obligation, to provide transportation, but it would not seem to limit the carrier's discretion as to the choice of equipment.

In a recent case the Commission issued an order directing defendant to desist from enforcing an order discontinuing the delivery of oil in tank cars at its Brooklyn Terminal.[39] In this case there was no rail shipper of oil into Brooklyn except complainant, and the order practically amounted to requiring defendant to deliver oil to complainant in tank cars. The power of the Commission to issue the order was not discussed and might appear open to doubt. In a subsequent case the Commission explained the decision as made in pursuance of its authority to regulate rules affecting rates,[40] but this explanation would not seem to be entirely satisfactory.

269. Same Subject—Location of Stations.

Another question of interest, arising under the Hepburn Amendment, is whether or not the Commission has power to require a carrier to locate or maintain a station at a given point. In view of the absence of a direct grant of such authority it would seem that the Commission has not this power. The fact that the Hepburn Act specifically gives it power to order switch connections would also point to the same conclusion.[41]

required to execute and enforce the provisions of this Act," but this provision would not seem to give the Commission authority to require the carriers to observe the law in every respect.

See I. C. C. v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479; 17 Sup. Ct. Rep. 896; 42 L. Ed. 243, (183-E).

(39) Preston & Davis v. Delaware, L. & W. R. Co., 12 I. C. C. Rep. 114, (478).

A preliminary injunction to vacate the order issued in this case was refused by the Circuit Court; see 14 I. C. C. Rep. 421.

(40) Wholesale Fruit Asso. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 410, 421, (705).

See infra, §281.

(41) See Eddlemen v. Midland Val. R. Co., 13 I. C. C. Rep. 103, 104, (579).

Lewis v. Chicago, R. I. & Pac. R. Co., 13 I. C. C. Rep. 138, (1908).

See also Boyle v. Waghorn on the English Railway & Canal Traffic Law, Vol. 1, Chap. XXII.

In a proper case, involving an undue preference between competing

270. Power to Fix Rates—Early Commission Decisions.

One of the most important questions under the Act as it stood prior to the Amendment of 1906, was whether or not the Commission had power to prescribe what maximum rates carriers should charge in the future.

The Act expressly provided that all rates be reasonable, and the Commission was required "to enforce the provisions of this Act." The Commission was not in terms given power to fix rates for the future, but in all the early cases involving unreasonable rates, its orders directed the carrier not only to cease from charging the rate complained of, but also to charge in the future no more than a rate found by the Commission to be reasonable.[42] The Commission never asserted that it had power to fix rates generally, but only that, when it had investigated a given case, it was not restricted to ordering the carrier to abolish the existing rate, leaving it free to reduce this rate by ½ a cent and thus compel a reinvestigation of the whole subject. The position taken by the Commission was well summarized by Commissioner Veazey in Perry *v.* Florida Cent. R. Co.:[43]

"It is not, of course, asserted that the Act confers on the Commission the general power to prescribe the traffic charges of carriers subject to its provisions. The general scope of the Act, as well as its specific provisions as to complaints to, and investigations and reports by, the Commission, forbid such an interpretation. But where complaint is made to the Commission, or a specific inquiry is instituted by it, on its own motion, and it is found after

localities in reference to station facilities, the Commission might, of course, order the discontinuance of the preference.

Jones v. St. Louis & S. F. R. Co., 12 I. C. C. Rep. 144, (484); 17th Ann. Rep. 68.

(42) Coxe Bros. v. Lehigh Val. R. Co., 4 I. C. C. Rep. 535, 576-8, (124-A).

Perry v. Florida Cent. & P. R. Co., 5 I. C. C. Rep. 97, 111, (142), and cases cited.

11th Ann. Rep. 15-16; 18th id. 8.

Murphy v. Wabash R. Co., 5 I. C. C. Rep. 122, 126, (143).

Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 548, 554, (180-C).

(43) 5 I. C. C. Rep. 97, 110, (142).

See also Thatcher v. Delaware & H. Can. Co., 1 I. C. C. Rep. 152, 156, (22).

due notice, hearing and investigation that an existing rate is unreasonable, the Commission is not restricted simply to finding that fact, and forbidding the carrier to continue to charge the existing rate; but it may go further and enforce a reasonable rate."

271. Same Subject—Decisions by the Courts Prior to the Amendment of 1906—I. C. C. v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479.

This question was first discussed by the Supreme Court in the Social Circle case[44] and it was there intimated, without, however, being expressly decided, that the Act gave the Commission no power to fix rates. After several Circuit Courts had followed this dictum in a number of cases,[45] the Supreme Court in the case of I. C. C. *v.* Cincinnati, N. O. & T. P. R. Co.,[46] decided definitely that the Commission had no power to prescribe rates which should control in the future, and could not therefore invoke from the Courts a peremptory order to enforce any such tariff by it prescribed. The decision was thus summarized by Mr. Justice Brewer at the end of his opinion:

"Our conclusion then is that Congress has not conferred upon the Commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the Commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past what was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the

(44) Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184, 196; 16 Sup. Ct. Rep. 582; 40 L. Ed. 935, (132-C). Decided in March, 1896.

(45) I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, (156-B).
I. C. C. v. Northeastern R. Co., 74 Fed. 70, (191-B).
I. C. C. v. Alabama Mid. R. Co., 74 Fed. 715; 21 C. C. A. 51; 41 U. S. App. 453, (170-C).
I. C. C. v. Lehigh Val. R. Co., 74 Fed. 784, (124-B).
I. C. C. v. Cincinnati, N. O. & T. P. R. Co., 76 Fed. 183, (183-D).

(46) 167 U. S. 479, 511; 17 Sup. Ct. Rep. 896; 42 L. Ed. 243, (183-E).
This decision was rendered on a question certified from the Circuit Court of Appeals.

railroad companies should follow the rates thus determined to have been in the past reasonable and just."

A number of later cases followed this decision.[47]

272. Same Subject—Commission and Court Decisions Subsequent to I. C. C. v. Cincinnati, N. O. & T. P. R. Co., and Prior to the Hepburn Amendment.

The Commission soon recognized that it was practically powerless to do anything with unreasonable rates but recommend their discontinuance, with an assurance to the shipper of a subsequent award of damages in case the rate was not reduced as recommended.[48]

After the decision in the I. C. C. *v.* Cincinnati, N. O. & T. P.

(47) I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144; 42 L. Ed. 414; 18 Sup. Ct. Rep. 45, (170-D).

Farmers' Loan & Tr. Co. v. Northern Pac. R. Co., 83 Fed. 249, (1897).

I. C. C. v. Northeastern R. Co., of S. C., 83 Fed. 611; 27 C. C. A. 631, (1897).

I. C. C. v. East Tenn., V. & G. R. Co., 85 Fed. 107, (162-B); 181 U. S. 1; 21 Sup. Ct. Rep. 516; 45 L. Ed. 719, (162-D).

Southern Pac. Co. v. Colorado Fuel & Iron Co., 101 Fed. 779, (201-C).

Louisville & N. R. Co. v. Brown, 123 Fed. 946, (1903).

I. C. C. v. Cincinnati, P. & V. R. Co., 124 Fed. 624, 627, (298-B).

I. C. C. v. Lake S. & M. S. R. Co., 134 Fed. 942, (309-B); 202 U. S. 613; 50 L. Ed. 1171; 26 Sup. Ct. Rep. 766, (309-B).

Compare I. C. C. v. Chicago, B. & Q. R. Co., 94 Fed. 272, (245-B).

I. C. C. v. Southern Pac. R. Co., 132 Fed. 829, 846, (302-C); 200 U. S. 536; 26 Sup. Ct. Rep. 330; 50 L. Ed. 585, (302-E).

See also Detroit G. H. & M. R. Co. v. I. C. C., 74 Fed. 803, 840-1; 43 U. S. App. 308; 21 C. C. A. 103, (100-C); 167 U. S. 633; 42 L. Ed. 306; 17 Sup. Ct. Rep. 986, (100-D).

(48) Cary v. Eureka Spgs. R. Co., 7 I. C. C. Rep. 286, 318-322, (235).

Montell v. Baltimore & O. R. Co., 7 I. C. C. Rep. 412, 430, (241).

Savannah Bur. v. Charleston & S. R. Co., 7 I. C. C. Rep. 458, 475, 479-80, (243).

Barrow v. Yazoo & M. V. R. Co., 10 I. C. C. Rep. 333, 336, (353).

Denison Light Co. v. Missouri, K. & T. R. Co., 10 I. C. C. Rep. 337, 341, (354).

Compare Milwaukee Ch. of Com. v. Chicago, M. & St. P. R. Co., 7 I. C. C. Rep. 481, 510, (244).

Eau Claire Bd. of Tr. v. Chicago, M. & St. P. R. Co., 5 I. C. C. Rep. 264, 294-5, (151).

In the case last cited the Commission stated that the fact that the carriers might lawfully render the Commission's decision ineffective, did not prevent it from stating its views.

R. Co., the Commission still maintained its power to enforce Sections 2, 3 and 4.[49] It contended that it might still prescribe the proper differential between competing commodities,[50] or direct their proper classification.[51] It would seem, however, that the original Act gave the Commission no more power to prevent carriers from charging in the future rates which the Commission judged illegal because working a preference or discrimination, than where the rates were simply unreasonable *per se;* if the Commission could not prescribe what was a reasonable rate for the future, neither could it fix what was a reasonable relation of rates. The later Federal cases so held.[52] There would also seem to be no logical difference between an order to charge no more than a given rate, and an order to cease from failing to place a given article in a given class which took a certain rate.[53]

273. Same Subject—Effect of the Hepburn Amendment.

The Amendment of 1906 gave to the Commission express power to determine after hearing, on complaint, what are reasonable rates for the future, and to require the observance of such rates.[54] In a number of the Federal cases, above cited,

(49) See Calloway v. Louisville & N. R. Co., 7 I. C. C. Rep. 431, 457, (242-A).

Phillips & Co. v. Louisville & N. R. Co., 8 I. C. C. Rep. 93, 108, (259).

Penna. St. Millers' Asso. v. Phila. & R. R. Co., 8 I. C. C. Rep. 531, 558, (283).

Cf. also Cincinnati Ch. of Com. v. Baltimore & O. S. W. R. Co., 10 I. C. C. Rep. 378, 383, (358).

(50) Milwaukee Ch. of Com. v. Chicago, M. & St. P. R. Co., 7 I. C. C. Rep. 481, 509, (244).

(51) Myer v. Cleveland, C. C. & St. L. R. Co., 9 I. C. C. Rep. 78, 86, (296).

(52) See cases, supra, §271, n.47.

(53) See I. C. C. v. Lake Sh. & M. S. R. Co., 134 Fed. 942, (309-B); 202 U. S. 613; 50 L. Ed. 1171; 26 Sup. Ct. Rep. 766, (309-B).

(54) Par. 1 of Section 15 is as follows:

"That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that

holding that prior to this Amendment, the Commission had no such power, the decision was rested on the ground that to prescribe rates for the future was a legislative and not a judicial act, and therefore one which the Commission could not perform. If this be entirely true, there would seem to be some doubt as to the power of Congress to delegate a strictly legislative function to a quasi-judicial body. It is submitted, however, that there is a clear distinction between the prescribing of rates generally without any complaint, controversy or special investigation, and directing the observance of a certain particular rate or schedule, after judicial investigation of its propriety.[55] It might well be that Congress would not have power to constitute the Commission a General Manager for all the railroads in the country, or to give it authority to evolve rate schedules for all lines out of its

any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such a period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order."

As to the powers and duty of the Commission in fixing rates under the Amendment of 1906, see also Missouri, K. & T. R. Co. v. I. C. C., 164 Fed. 645, (399-E).

(55) See Chicago & N. W. R. Co. v. Dey, 35 Fed. 866, 873; 1 L. R. A. 744n, (1888).

own consciousness, but the Commission does not and never has claimed such extensive power.[56] Congress would seem clearly to have power to authorize it to enforce the provisions of the Act by ordering compliance with rates, which, on investigation, it judged reasonable. In so doing, it acts not in a legislative, but in a judicial capacity.

It will be noted that Section 15 does not expressly authorize the Commission to fix rates in a proceeding instituted on its own motion, but only after full hearing on complaint filed.

274. The Commission has no Power to Order an Increase in Rates.

The Commission decided in an early case that it had no power to declare a rate unreasonably low, or to order its increase to a reasonable figure.[57]

275. Power to Prescribe Through Routes and Joint Rates—Decisions Prior to the Hepburn Amendment.

The power of the Commission to prescribe through routes and rates and to compel connecting lines to enter into through traffic arrangements has been discussed in a former chapter, in connection with discriminations between connecting lines.[58] Prior to the Amendment of 1906, the Commission did not have this power,

(56) Supra, §270.

National Pet. Asso. v. Ann Arbor R. Co., 14 I. C. C. Rep. 272, 281, (692)

(57) Re Chicago, St. P. & K. C. R. Co., 2 I. C. C. Rep. 231, 253, (58).

See also Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, 174, (24).

Commercial Club of Omaha v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 678, (212).

Re Cotton Rates, etc., 3 I. C. C. Rep. 191, 192, (261).

Cf. Poughkeepsie Iron Co. v. New York Cent. R. Co., 4 I. C. C. Rep. 195, 211, (113).

Brownell v. Columbus & C. M. R. Co., 5 I. C. C. Rep. 636, 647, 649, (167).

Kansas City Co. v. Chicago, R. I. & P. R. Co., 14 I. C. C. Rep. 468, 470, (709).

(58) Supra, Chap. XVIII.

and it was frequently so held both by the Commission itself[59] and by the Federal Courts.[60] The absence of authority to prescribe through rates did not, however, affect the power of the Commission to pass upon their reasonableness.[61]

276. Same Subject—Effect of the Hepburn Amendment—Attitude of the Commission.

The Amendment of 1906 makes it the duty of carriers, under the Act, to "establish through routes and just and reasonable through rates applicable thereto,"[62] and gives the Commission power, after hearing on complaint, to establish through routes

(59) Between two railroads, Little Rock & M. R. Co. v. East T., V. & G. R. Co., 3 I. C. C. Rep. 1, (77).

Mattingly v. Penna. Co., 3 I. C. C. Rep. 592, 611-612, (98).

Independent Ref. Asso. of Tex. v. Penna. Co., 6 I. C. C. Rep. 52, 58, (155-B).

Omaha Com. Co. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 677, (212).

New York, N. H. & H. R. Co. v. Platt, 7 I. C. C. Rep. 323, 334, 338, 350, (236).

Gustin v. Illinois C. R. Co., 7 I. C. C. Rep. 376, 379, (238).

Kentucky R. Com. v. Louisville & N. R. Co., 10 I. C. C. Rep. 173, 187-9, (343).

Clark Co. v. Lake S. & M. S. R. Co., 11 I. C. C. Rep. 558, 574, 579, (420).

Moran v. Missouri Pac. R. Co., 11 I. C. C. Rep. 598, 604, (425).

But see New York & N. R. Co. v. New York & N. E. R. Co., 4 I. C. C. Rep. 702, (130-A).

A fortiori this was true where one of the connecting carriers was a water line.

Re Joint Rail & Water Lines, 2 I. C. C. Rep. 645, (1889).

Capehart v. Louisville & N. R. Co., 4 I. C. C. Rep. 265, (117).

Re Enterprise Tr. Co., 11 I. C. C. Rep. 587, 597, (1906).

(60) Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 630-1; 2 L. R. A. 289, (57-B).

Little Rock & M. R. Co. v. St. Louis I. M. & S. R. Co., 41 Fed. 559, (93). (See 47 Fed. 771), (135).

Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912, 915; 10 U. S. App. 430; 3 C. C. A. 347, (138-C).

See also supra, Chap. XVIII, §221.

(61) Illinois Cent. R. Co. v. I. C. C., 206 U. S. 441, 465; 51 L. Ed. 1128; 27 Sup. Ct. Rep. 700 (369-B).

See also Moran v. Northern Pac. R. Co., 11 I. C. C. Rep. 598, 604, (425).

(62) Section 1, Par. 1.

and maximum joint rates and to prescribe the division thereof among the carriers, provided no reasonable or satisfactory route exists.[63]

Although a carrier desiring a through route may file a complaint under this provision, its purpose was to afford relief to shipping communities and not to aid carriers to acquire strategic advantages in their contests with one another.[64]

Under this provision the Commission is not obliged to order a through route in every case where none exists, and need do so only in a proper case where the public interest appears to require it.[65]

277. Same Subject—What Constitutes a Reasonable and Satisfactory Through Route.

The Commission has said that it will not exercise its authority in this regard upon light or unsubstantial grounds, or merely to satisfy the whims or fancies of shippers in seeking unusual markets in which to purchase their supplies. It regards the op-

(63) For Par. 1 of Section 15 see supra, §273, n.54.

Par. 2 of Section 15 is as follows:

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

As to the constitutionality of this provision see—

Kentucky & I. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 634; 2 L. R. A. 289, (57-B).

Minnesota & St. L. R. Co., v. Minnesota, 186 U. S. 257; 46 L. Ed. 1151; 22 Sup. Ct. Rep. 901, (1902).

(64) Chicago & M. El. Ry. Co. v. Illinois Cent. R. Co., 13 I. C. C. Rep. 20, 26, (563).

Cedar Rap. Ry. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 250, (606).

Cf. also Rahway Val. R. Co. v. Delaware, L. & W. R. Co., 14 I. C. C. Rep. 191, 194, (683-A).

(65) Loup Creek Co. v. Virginia Ry. Co., 12 I. C. C. Rep. 471, 477, (541).

See also Cattle Raisers' Asso. v. Galveston, H. & S. A. R. Co., 12 I. C. C. Rep. 20, 22, (453).

portunity to buy in a widely extended market, however, as valuable, both to shippers and to the general public, and has held that a carrier may not restrict this opportunity by refusing through routes and joint rates merely on the ground that it is able to supply the market from producing points on its own rails.[66]

The Commission has said that through routes and joint rates will not be forced on a carrier unless there is some substantial reason for it, and it has refused to compel a railroad to enter into such an arrangement with a small electric line, having no cars, and doing no general freight business.[67] Where there is doubt as to the responsibility of one of the parties to the proposed through route it will be required to give a bond of indemnity.[68]

In order to give the Commission jurisdiction, it need not appear that the refusal of the through route produces an unreasonable rate or an unjust discrimination.[69]

In a number of cases the Commission has required the establishment of through routes.[70] Where a combination through rate

(66) Star Co. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 364, 367, (703).

(67) Leonard v. Kansas City So. R. Co., 13 I. C. C. Rep. 573, 588, (645).

(68) Enterprise Tr. Co. v. Pennsylvania R. Co., 12 I. C. C. Rep. 326, 338, (517).

(69) Pacific Coast Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 51, 53, (666).

(70) Cattle Raisers' Asso. v. Galveston, H. & S. A. R. Co., 12 I. C. C. Rep. 20, (453).

Birmingham Pkg. Co. v. Texas & Pac. R. Co., 12 I. C. C. Rep. 29, (458), (voluntarily established by defendants after filing and hearing of complaint).

Gentry v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 171, (593).

Little Rock Fr. Bur. v. Midland Val. R. Co., 13 I. C. C. Rep. 243, (604).

Cedar Rapid Ry. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 250, (606).

Benton Tr. Co. v. Benton Har. Ry. Co., 13 I. C. C. Rep. 542, (641); here a through route already existed, but the Commission held that it was not a satisfactory one. Defendant was an intrastate road and the Commission, as would appear from its opinion, acquired jurisdiction solely by defendants' having formed a through route with a boat line competing with complainant.

Cardiff Coal Co. v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 460, (632).

Randolph Co. v. Seaboard A. L. R. Co., 13 I. C. C. Rep. 601, 604, (649).

is complained of as unreasonable, no through route existing, the proper relief is in a proceeding to have a through route established, where the Commission may apportion the reduction among the various carriers.[71]

The Commission cannot establish a through route where a reasonable or satisfactory one already exists;[72] nor can it establish but one route where none already exists.[73]

Where a satisfactory through route adequately serves the general neighborhood or territory, the Commission cannot compel the formation of another, although no through route exists to the particular spot in question;[74] but the existence of a through route to one part of a large city does not preclude the Commission from ordering another route to another part of the city for the accommodation of shippers who cannot reasonably use the first.[75]

The Commission has held that the existence of the reasonable and satisfactory through route which destroys its jurisdiction must be determined as of the date of the filing of the complaint and that the re-establishment, before the hearing, of a previously existing through route does not divest its jurisdiction.[76] In the same case it was held that the reasonableness of the existing through route might to a certain extent be tested by the amount

(71) Merchants' Tr. Asso. v. New York, N. H. & H. R. Co., 13 I. C. C. Rep. 225, 228-9, (**600**).

(72) Enterprise Tr. Co. v. Penna. R. Co., 12 I. C. C. Rep. 326, 331-332, (**517**).

Chicago & M. R. Co. v. Illinois Cent. R. Co., 13 I. C. C. Rep. 20, (**563**).

Anthony v. Philadelphia & R. R. Co., 14 I. C. C. Rep. 581, (**722**).

(73) Cardiff Coal Co. v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 460, 470, (**632**).

(74) Chicago & M. El. R. Co. v. Illinois Cent. R. Co., 13 I. C. C. Rep. 20, 24-5, (**563**).

Cf. Gentry v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 171, (**593**).

(75) Leonard v. Kansas City So. R. Co., 13 I. C. C. Rep. 573, 588, (**645**).

In this case Prouty, C., said: "A route cannot be called satisfactory unless it reasonably accommodates traffic which is entitled to accommodation."

(76) Enterprise Tr. Co. v. Pennsylvania R. Co., 12 I. C. C. Rep. 326, 337, (**517**).

Compare Pacific Coast Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 51, (**666**), where the decision would seem somewhat inconsistent with the above case.

of the rate applicable over it, and that where one of the parties to the existing transportation was a water line which refused to concur in the through tariff filed by the other carriers, the route was not such a one as to prevent the establishment of another in which all the parties were subject to the Commission's jurisdiction, although the non-concurring water line would seem merely to have been employed by the carriers who were the real parties to the transportation and who were all subject to the jurisdiction of the Commission. None of the propositions decided in this case would seem beyond question.

Distance is an important but not controlling factor in determining the reasonableness of an existing route.[77]

The Commission has said that a wide difference exists between a reasonable route for the movement of freight and one for passenger traffic.[78]

278. Same Subject—Power to Regulate Interchange of Equipment.

There would seem to be a question as to the power of the Commission to require connecting lines to furnish an initial road with cars to compensate it for those which the establishment of a through route would require it to let go off its own line.[79] Under the existing legislation, it would appear that the Commission has not this power.

279. Same Subject—Divisions of Joint Rates Among Carriers.

The practice of the Commission in prescribing through rates is to leave the division of the rate, where possible, to the voluntary adjustment of the carriers.[80] When it becomes necessary

(77) Pacific Coast Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 51, 54, (666).

(78) Pacific Coast Co. v. Northern Pac. R. Co., 14 I. C. C. Rep. 51, 59, (666).

(79) American Live Stock Asso. v. Texas & Pac. R. Co., 12 I. C. C. Rep. 32, 36, (459).

See also Memphis Frt. Bur. v. Fort Sm. & W. R. Co., 13 I. C. C. Rep. 1, 8, (561).

Cedar Rap. Ry. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 250, (606).

(80) See Cedar Rap. R. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 250, 256, (606).

to apportion the rate among the connecting lines the Commission will take into consideration all the circumstances, conditions and equities necessary to arrive at what is a fair and proper adjustment of the situation as between the two roads. Where the result of the establishment of the through route will be to deprive one of the carriers of traffic hauled only over its own rails, this fact entitles such carrier to a large division of the through rate.[81]

The amount of such divisions is not necessarily determined by the amounts accepted by the carriers in connection with other lines.[82]

In one case where the carriers were unable to agree on their respective shares of the through rate, the Commission fixed these on a mileage basis, but said that this case depended on its peculiar facts and must not be taken as establishing a general rule.[83]

280. Power to Award Damages.

Under the original Act of 1887, the Commission had no power to award damages, since that Act provided no method for allowing the defendant the jury trial to which it was entitled under the Seventh Amendment of the Federal Constitution.[84] The Amendment of March 2, 1889,[85] provided for a jury trial before the Federal Court, at the request of the defendant, in cases where the Commission awarded damages. This Amendment removed the constitutional objection and made it the duty of the Commission to pass on the question of damages in every case in which this question was involved.[86]

(81) Star Co. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 364, 370, (**703**).

(82) Enterprise Tr. Co. v. Pennsylvania R. Co., 12 I. C. C. Rep. 326, 338, (**517**).

(83) Birmingham Pkg. Co. v. Texas & Pac. R. Co., 12 I. C. C. Rep. 500, (**458**).

(84) Councill v. Western & A. R. Co., 1 I. C. C. Rep. 339, (**33**).
Riddle Dean & Co. v. New York, L. E. & W. R. Co., 1 I. C. C. Rep. 594, 607, (**43**).
But see Bishop v. Duval, 3 I. C. C. Rep. 128, 129, (1889).
Sanger v. Southern Pac. R. Co., 3 I. C. C. Rep. 134, (**81**).

(85) See supra, pp. 25-26.

(86) Macloon v. Chicago & N. W. R. Co., 5 I. C. C. Rep. 84, (**141**).
Florida R. Com. v. Savannah, F. & W. R. Co., 5 I. C. C. Rep. 136, 150-**151, (137).**

The Commission alone has power to award reparation for excessive charges, where the rate collected was in accordance with tariffs duly filed.[87]

281. Power Over Regulations Affecting Rates.

(See also supra, §§267-269).

The Commission has power under Section 15, as amended by the Hepburn Act, to order the discontinuance of any unreasonable regulation or practice affecting rates, and to provide and compel the adoption of a reasonable substitute therefor.[88]

This provision gives the Commission power to regulate methods of car-distribution among coal mines. Any practice or regulation producing an unjust discrimination or preference is regarded by the Commission as one "affecting rates" within the meaning of the phrase quoted, and it has said that these words "embrace all regulations and practices of the carriers under which they offer their services to the shipping public and conduct their transportation." [89]

Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co., 10 I. C. C. Rep. 83, 88-9, (245-F).

Minneapolis Threshing Co. v. Chicago, R. I. & P. R. Co., 13 I. C. C. Rep. 128, 130, (586).

This Amendment did not affect proceedings pending at the date of its passage.

Rawson v. Newport, N. & M. V. R. Co., 3 I. C. C. Rep. 266, (1889).

The Commission has said that it has no power to allow a set-off.

Pitts v. St. Louis & S. F. R. Co., 10 I. C. C. Rep. 684, 689, (378).

(87) See supra, §§240-243, and infra, §309.

(88) For the provision in question see supra, §273, n.54.

Romona Stone Co. v. Vandalia R. Co., 13 I. C. C. Rep. 115, 116-7, (583).

But cf. Chickasaw Comp. Co. v. Gulf C. & S. F. R. Co., 13 I. C. C. Rep. 187, 189, (596).

(89) Rail & River Coal Co. v. Baltimore & O. R. Co., 14 I. C. C. Rep. 86, 91, (670).

Wholesale Fr. As. v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 410, 421, (705).

See also California Com. As. v. Wells Fargo & Co., 14 I. C. C. Rep. 422, 425, (706).

Kehoe v. Nashville, C. & St. L. R. Co., 14 I. C. C. Rep. 555, (720).

In St. Louis Tr. Bur. v. Chicago, B. & Q. R. Co., 14 I. C. C. Rep. 317, 330, (698), Prouty, C., said:

"There is no difference in principle between the giving of a service and

282. Regulation of Charges for Incidental Services.

The Commission's power with regard to the regulation of charges for incidental services is as broad as that over rates proper.[90]

283. Allowances to Shippers for Services.

Paragraph 3 of Section 15 of the Act, as amended in 1906, provides as follows:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

Under this provision, shippers are entitled to compensation only in case the services in question are transportation services which they could have required the carriers to perform, and they are not entitled to an allowance for switching cars over their own property for their own convenience.[91]

284. Regulation of Publication of Tariffs.

Under Section 6 the Commission has practically the absolute direction of the manner and form in which tariffs are to be pub-

the giving of the money with which to buy the service, and we have no doubt that this Commission has the same jurisdiction to prohibit the granting of the free service (elevation) which it has to prohibit the payment of the allowance."

(90) See Truck Farmers' Asso. v. Northeastern R. of S. C., 6 I. C. C. Rep. 295, (**191**-A).

Re Transportation of Fruit, 10 I. C. C. Rep. 360, (**357**-A); 11 I. C. C. Rep. 129, (**357**-B).

(91) General El. Co. v. N. Y. C. & H. R. R. Co., 14 I. C. C. Rep. 237, (**689**).

Solvay Process Co. v. Del., L. & W. R. Co., 14 I. C. C. Rep. 246, (**690**).

Re Allowances for Transportation, 14 I. C. C. Rep. 619, (**725**).

See also supra, §162.

And Laning-Harris Co. v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 148, 151, (**589**).

lished and filed by carriers.[92] It has no power, however, to require a carrier to publish in its tariff an allowance to a connecting line with which no through route has been formed, either voluntarily or by its order, and it can modify published tariffs only in the manner prescribed by the Act.[93]

285. Powers of Investigation.

The Commission's power to investigate the affairs and business of carriers subject to the Act is only as broad as its power to regulate.[94] In a recent case, Mr. Justice Holmes, delivering the opinion of the Supreme Court, said:[95]

"The purposes of the Act for which the Commission may exact evidence embrace only complaints for violation of the Act, and investigations by the Commission upon matters that might have been made the object of complaint."

In the above case the Commission contended that the Act gave to it power to make any investigation that it considered proper, not only to discover facts tending to defeat the purposes of the Act, but also to aid it in recommending additional legislation relating to the regulation of interstate commerce. The Court refused to sustain this contention.

The Commission may not undertake an investigation of the affairs of a carrier on complaint of a stockholder, in order to obtain for him information to enable him to prosecute a suit in equity; nor will it do so of its own motion under the power conferred by Section 12, where it does not appear that any violation of the Act has been committed or that any public purpose would be subserved by such investigation.[96]

(92) See American Warehousemen's Asso. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, 592, (247).

Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 220; 16 Sup. Ct. Rep. 666; 40 L. Ed. 940, (122-D).

I. C. C. v. Detroit, G. H. & M. R. Co., 167 U. S. 633, 646; 42 L. Ed. 306; 17 Sup. Ct. 986, (100-D).

And supra, Chap. XIX.

(93) La Salle R. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 610, 612, (651).

(94) For provisions of the Act conferring on the Commission powers of investigation see Sections 12 and 20, supra, pp. 18, 34.

(95) Harriman v. I. C. C., 211 U. S. 407, 419, (580-B), reversing I. C. C. v. Harriman, 157 Fed. 432, 439, (580-A).

(96) Manning v. Chicago & A. R. Co., 13 I. C. C. Rep. 125, (585).

286. Issuing General Orders.

In a leading case[97] the Supreme Court stated that although the Commission had authority to issue general orders to carriers, in so doing it must have in view the promotion of commerce and must consider the welfare of carriers as well as that of shippers and consumers, and that such orders must be confined to the obvious purposes of the Act.

The Commission probably has no power to subject a carrier to a penalty without a hearing or complaint.[98]

287. Power to Alter or Modify its own Orders.

Even before the Amendment of 1906 to Section 16, expressly authorizing the Commission to "suspend or modify its orders upon such notice and in such manner as it shall deem proper," the Commission probably had this power, its orders being essentially administrative and not final and conclusive like a Court's decree.[99]

288. Criminal Proceedings.

The Commission has no power to impose on a carrier a fine for violating any of the provisions of the Act. It merely advises the United States Attorney to institute proceedings.[100]

289. Expenses of the Commission.

The Secretary of the Commission may obtain reimbursement for telegrams sent on the business of the Commission, without giving copies to the Comptroller, merely by securing the written approval of the Chairman of the Commission.[101]

(97) Tex. & Pac. R. Co. v. I. C. C., 162 U. S. 197, 216, 234; 16 Sup. Ct. Rep. 666; 40 L. Ed. 940, (**122**-D).

(98) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 216; 16 Sup. Ct. Rep. 666; 40 L. Ed. 940, (**122**-D).

(99) See I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 423, (**156**-B).

(100) Slater v. Northern Pac. R. Co., 2 I. C. C. Rep. 359, (**64**).
See also Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 148, 167, (**180**-A).
Listman Co. v. Chicago, M. & St. P. R. Co., 8 I. C. C. Rep. 47, 70, (**257**).
Re Rates, etc., 13 I. C. C. Rep. 123, 212, (1908).

(101) U. S. v. Moseley, 187 U. S. 322; 23 Sup. Ct. Rep. 90; 47 L. Ed. 198, (1902).

CHAPTER XXV.

PRACTICE BEFORE THE COMMISSION.

290. General Attitude of the Commission — Toward Shippers—Protecting the Weak Against the Strong.
291. Same Subject—The Commission Seeks to Promote the Best Interest of Shippers.
292. Same Subject—Spite Cases Not Favored — Clean Hands.
293. Same Subject—Transactions in Dual Capacity of Carrier and Shipper or Dealer Closely Scrutinized.
294. Same Subject—Attitude Toward Carriers — Early Cases.
295. Same Subject—Alteration of Such Attitude in Recent Years—Extravagant Competition not Favored.
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311. Same Subject—Proof Necessary to Sustain Action for Unreasonable Charges.
312. Same Subject—Excessive Charges Need not Have Been Paid Under Protest.
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314. Same Subject—Measure of Damages for Unreasonable Charges.
315. Same Subject—Charges for Incidental Services.
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317. Same Subject—Discrimination Cases—Nature of Action for Damages in Such Cases.
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319. Same Subject—Measure of Damages for Discrimination in Facilities.
320. Same Subject—Measure of Damages for Preferences Between Localities and Violation of Section 4.
321. Same Subject—Failure to Post Rates.
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323. Parties Entitled to Damages.
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325. Limitation of Actions.
326. Orders of the Commission.
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328. Holding Cases Open.
329. Applications for Rehearing.

290. General Attitude of the Commission (1)—Toward Shippers—Protecting the Weak Against the Strong.

(See also supra Chap. VIII, §80, et seq).

The Commission has from its inception placed itself on the side of the weak as against the strong, and as protecting the small shipper against his larger and more powerful competitor.[1] The principal evils which led to the passage of the Act were low rates to the large commercial centers in preference of the smaller surrounding towns, and the allowance of special concessions to large shippers, enabling them to undersell the small merchants who get no rebates. This attitude on the part of the Commission is not therefore unnatural.

The Commission will not lend its aid to secure privileges which will inure to the benefit of large shippers as against smaller ones. On this principle the Commission has refused to require carriers

(1) Providence Coal Co. v. Providence & W. R. Co., 1 I. C. C Rep. 107, 117-118, (17).

Farmington B. of Tr. v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep. 215, 222, (29).

Rice v. Western N. Y. & P. R. Co., 2 I. C. C. Rep. 389, 396, (67).

Re Grand Tr. Ry. of Can., 3 I. C. C. Rep. 89, (78).

New York Pr. Exch. v. Baltimore & O. R. Co., 7 I. C. C. Rep. 612, 683-684, (252).

Re Cotton Rates by K. C. M. & B. R. Co., 8 I. C. C. Rep. 121, 133, (261).

Hampton Bd. of Tr. v. Nashville, C. & St. L. R. Co., 8 I. C. C. Rep. 503, 523, (281-A).

Proctor v. Cincinnati, H. & D. R. Co., 9 I. C. C. Rep. 440, 490, (314-A).

Planters' Comp. Co. v. Cleveland, C., C. & St. L. R. Co., 11 I. C. C. Rep. 382, 402-403, (402).

to allow carload rates less than the regular rates per 100 pounds.[2] It has also refused to compel carriers to allow reduced rates on articles shipped in a manner making the cost of service cheaper, where this method was available only to a few large shippers.[3] So, where it has appeared that the relief asked would tend to prevent a monopoly by some large shipper, the Commission will be found to stretch its powers to prevent this result.[4]

291. Same Subject—The Commission Seeks to Promote the Best Interest of Shippers.

The Commission has always endeavored to promote what it considered the best interest of shippers and of the public, and in a number of cases has overlooked or refused to correct apparent violations of the Act where the interest of shippers did not demand it or seemed to require the continuance of the questionable practice. Thus it has declined to order a reduction in rates asked by a shipper, the enforcement of which would apparently be to his ultimate disadvantage.[5]

(2) Brownell v. Columbus & C. M. R. Co., 5 I. C. C. Rep., 638, 654, 656, (167).
Schumacher Co. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 61, 83, (172).
Kindel v. Boston & A. R. Co., 11 I. C. C. Rep. 495, 506, (412).
See also Paper Mills Co. v. Penna. R. Co., 12 I. C. C. Rep., 438, (534).
Milwaukee Co. v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 28, (566).
See also opinions in California Com. Ass'n. v. Wells, Fargo & Co., 14 I. C. C. Rep. 422, (706).
Export Shipping Co. v. Wabash R. Co., 14 I. C. C. Rep. 437, (707).

(3) See Planters' Comp. Co. v. Cleveland C. C. & St. L. R. Co., 11 I. C. C. Rep. 382, 391, 420, (402).
Also cases relating to tank and barrel shipments of oil, supra §63 and 151.

(4) See Rice v. Western N. Y. & P. R. Co., 2 I. C. C. Rep. 389, 396 (67).
Preston v. Delaware, L. & W. R. Co. 12 I. C. C. Rep. 114, (478).

(5) See Johnston Co. v. Wabash R. Co., et al., 12 I. C. C. Rep. 51, (463).
Johnston Co. v. New York & T. S. S. Co., et al., 12 I. C. C. Rep. 58, (464).
See also supra §189.

292. Same Subject—Spite Cases not Favored—Clean Hands.

The Commission has not favored spite cases,[6] nor suits brought to test rates in which the complainant has no real interest and which do not appear to be of importance to the public.[7]

The principle that one coming into equity must do so with clean hands, is not applied by the Commission where the interest of other shippers or of the general public is involved. In most cases before the Commission public considerations are paramount to the interest of the individual complainant.[8]

293. Same Subject—Transactions in Dual Capacity of Carrier and Shipper or Dealer Closely Scrutinized.

As indicated in a prior chapter, the Commission will closely scrutinize a transaction by which a shipper undertakes to perform transportation services for a carrier or whereby the carrier sells goods to a shipper or performs services for him other than trans-

(6) Slater v. Northern Pac. R. Co., 2 I. C. C. Rep. 359, (**64**).

Tileston Mill Co. v. Northern Pac. R. Co., 8 I. C. C. Rep. 346, 363, (**272**).

(7) Harrell v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 27, (1907).

See also Kindel v. New York, N. H. & H. R. Co., 11 I. C. C. Rep. 514, (**413**).

(8) See Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 148, 167-168, (**180**-A).

Cattle Raisers' Ass'n. v. Fort W. & D. C. R. Co., 7 I. C. C. Rep. 513, 534-535, (**245**-A).

I. C. C. v. Southern Pac. Co., 132 Fed. 829, 847, (**302**-C), (reversed 200 U. S. 536; 50 L. Ed. 585; 26 Sup. Ct., 330, (**302**-E), but not on this point).

Cf., however, Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co., 3 I. C. C. Rep. 450, 462, (**90**).

See also Merchants' Pr. Co. v. North Am. Ins. Co., 151 U. S. 368; 14 Sup. Ct. 367; 38 L. Ed. 195, (1894).

Gardner v. Southern R. Co., 10 I. C. C. Rep., 342, 351, (**355**).

Cf. also International Coal Mining Co. v. Penna. R. Co., 162 Fed. 996, (**660**), where Judge Holland held that a shipper was not entitled to recover damages for discrimination on account of rebates paid other shippers during years when he himself had received concessions, although to a less extent than those allowed his competitors. An appeal to the Circuit Court of Appeals in this case is pending.

A shipper is not prevented, on the principle of estoppel, from recovering excessive and discriminating charges even where he paid them seemingly voluntarily; see infra, §312.

See also supra, §244, n.90.

portation. In such cases the burden is practically on the parties to such transactions to show that they are *bona fide* and are not merely devices to give or secure concessions in transportation charges.[9]

294. Same Subject—Attitude Toward Carriers—Early Cases.

In the early days of its existence, the Commission assumed an attitude somewhat hostile to the railroads, regarding it as its function rather to protect the shipper against his natural enemy, the carrier, than to promote equitable relations between the two.

This attitude was largely the result of the high-handed way in which the railroads treated the Commission, owing to the lack of power on the part of the Commission to enforce its own orders, and to the continual refusal by the Courts to enforce them because of the Commission's misconstructions of the law. During the first fifteen years of the Commission's existence also, public opinion was rather indifferent to the grievances of shippers or to the abuses by carriers. Until recently, the powerful weapon of publicity, which with public opinion in a proper state is of more value than the power to fix rates, was entirely insufficient to produce on the part of the railroads that respect for the Commission which they would naturally have for a body with power to enforce its orders and with the public behind it ready to pass radical laws on the slightest provocation.

295. Same Subject—Alteration of Such Attitude in Recent Years —Extravagant Competition not Favored.

During later years, however, since the decisions of the Supreme Court requiring the consideration of the carrier's interest as well as that of the shipper in passing on the justice of rates, since the acquisition of new powers by the Commission and since the change in public opinion, the attitude both of the carriers toward the Commission and of the Commission toward the carriers has greatly changed and the interest of the carrier now receives consideration as well as that of the shipper and the general public.[10]

(9) See supra, Chapter XIV, §162 et seq.

(10) See Danville v. Southern R. Co., 8 I. C. C. Rep. 409, 431, 439, (277-A).

Hampton B'd. of Tr. v. Nashville, C. & St. L. R. Co., 8 I. C. C. Rep. 503, 529, (281-A).

See also supra §83.

The Commission has never favored extravagant competition among carriers, such as would produce unduly low rates, ruinous to the stockholders.[11]

296. Where the Carriers are Evidently Desirous of Complying with the Law the Commission will not Usually Interfere.

Where it appears in a given case that the defendant carrier is desirous of treating all shippers fairly, the Commission will often refuse to issue an order against it, although such would be proper on principle, deeming it to be for the best interest of the public that the railroad be trusted voluntarily to adjust the grievances complained of, on their being called to its attention.[12]

Similarly, the Commission, until recently, refused to issue an order against a carrier which had conceded the relief prayed for after the filing of the complaint and before a decision of the case. Where in such cases reparation was asked for past overcharges or discriminations, it held the case open for proof of damages, but without issuing an order requiring the continuance of the altered rates.[13] By an Administrative Ruling, however, on January 6th, 1908 (No. 14), the Commission adopted the practice in such cases of issuing an order directing the maintenance of the reduced rate as a maximum for two years from the date of the order in cases arising on formal complaints, and for one year in special reparation cases.

(11) See Gerke Co. v. Louisville & N. R. Co., 5 I. C. C. Rep. 596, 606, (**164**).
Re Canadian Pac. Pass. Rate. Diff., 8 I. C. C. Rep. 71, 83, (**258**).
Holdzkom v. Michigan Cent. R. Co., 9 I. C. C. Rep. 42, 53, (**292**).
Farrar v. Southern R. Co., 11 I. C. C. Rep. 640, 648, (**434**).

(12) Re Transportation of Fruit, 11 I. C. C. Rep. 129, 143, (**357-B**).
Kindel v. Atchison, T. & S. F. R. Co., 9 I. C. C. Rep. 606, 619, (**327**).
Cincinnati Ch. of Com. v. Baltimore & O. S. W. R. Co., 10 I. C. C. Rep. 378, 384, (**358**).

(13) See cases cited by Bragg, C., in New York Bd. of Tr. & Trans., et al., v. Penna. R. Co., et al., 4 I. C. C. Rep. 447, at page 520, (**122-A**).
Also Fulton v. Chicago, St. P., M & O. R. Co., 1 I. C. C. Rep. 104, (**16**).
Bishop v. Duval, Receiver, 3 I. C. C. Rep. 128, (1889).
Lincoln Bd. of Tr. v. Union Pac. R. Co., 3 I. C. C. Rep. 221, (1889).
Penna. Co. v. Louisville, N. A. & C. R. Co., 3 I. C. C. Rep. 223, (1889).
New Orleans Cot. Exch. v. Louisville, N. O. & T. Co., 4 I. C. C. Rep. 694, (1891).
Michigan Box Co. v. Flint & P. M. R. Co., 6 I. C. C. Rep. 335, (**196**).
Re Ill. Cent. R. Co., 6 I. C. C. Rep. 624, (1896).

297. Procedure Before the Commission.

(See Rules of Practice, Appendix).

Proceedings before the Commission are conducted in the simplest form consistent with certainty and justice.[14] Actions

Boyer v. Chesapeake, O. & S. W. R. Co., 7 I. C. C. Rep. 55, (**217**).

Freeman v. Atchison, T. & S. F. R. Co., 7 I. C. C. Rep. 202, (**225**).

Payne Bros. & Co. v. Lehigh Val. R. Co., 7 I. C. C. Rep. 218, (**228**).

Montell v. Baltimore & O. R. Co., 7 I. C. C. Rep. 412, 428-429, (**241**).

Sayles v. New York, N. H. & H. R. Co., 9 I. C. C. Rep. 492, (1903).

Wichita v. Atchison T. & S. F. R. Co., 9 I. C. C. Rep. 507, (1903).

Paxton Tie Co. v Detroit So. R. Co., 10 I. C. C. Rep. 422, (**363**).

Re Corn Rates, 11 I. C. C. Rep. 227, (1905).

Ohsman v. Chicago, R. I. & P. R. Co., 12 I. C. C. Rep. 63, (1907).

McRae Grocery Co. v. Southern Ry. Co., et al., 12 I. C. C. Rep. 83, (1907).

Holcomb-Hayes Co. v. Illinois Cent. R. Co., 12 I. C. C. Rep. 128, (1907).

Hale-Halsell Grocery Co. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 136, (1907).

Payne v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 190, (1907).

Lead Com. Club v. Chicago & N. W. R. Co., 12 I. C. C. Rep. 460, (1907).

Cf. also MacLoon v. Chicago & N. W. R. Co., 5 I. C. C. Rep. 84, (**141**).

The same practice has been followed where there had been a substantial reduction in the rate since the filing of the complaint, although the entire relief prayed for was not conceded.

Morrell v. Union Pac. R. Co., 6 I. C. C. Rep. 121, 130, (**176**).

In certain instances, however, where the carrier has assumed a hostile attitude, an order has been issued requiring the continuance of the altered rates. Blackwell Co. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 23, (**456**).

(See also Hope Lumber Co. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 191, (1907).

Riddle v. New York, L. E. & W. R. Co., 1 I. C. C. Rep. 594, 607, (**43**).

Merchants Tr. Ass'n. v. Pac. Exp. Co., 13 I. C. C. Rep. 131, 133, (1908).

See also the following, where the complaint has been dismissed without prejudice, at the request of the complainant:

Wilhoit v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 139, (**482**).

National Petrol. Ass'n. v. P. R. R. Co., 12 I. C. C. Rep. 151, 153, (1907).

Kalamazoo Tank Co. v. Michigan Cent. R. Co., 12 I. C. C. Rep. 154, (1907), (reparation here awarded).

Miller Bros. v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 157, (1907).

Wilhoit v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 158, (1907).

Amarillo Gas Co. v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 209, (1907).

Sioux City Com. Cl. v. Chicago, M. & St. P. R. Co., 12 I. C. C. Rep. 253, (1907).

(14) Re Procedure, 1 I. C. C. Rep. 223, 224, (1887).

1st Ann. Rep., 1 I. C. C. Rep. 299.

inter partes are begun by petition or complaint as required by Section 13 of the Act.[15] No formal recording of appearance is necessary.[16]

Actions before the Commission are of two kinds, those involving individual complaints, and those presenting a public grievance. Any person, corporation or association may call the Commission's attention to the latter class of complaint.[17] In such cases, where

(15) Sec. 13 is as follows:

"That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition, which briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

"Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

"No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 17 also provides as follows:

"That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . . Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. . . ."

(16) Re Food Products Rates, 4 I. C. C. Rep. 116, 123, (1890).

(17) American Warehousemen's Ass'n. v. Illinois Cent. R. Co., 7 I. C. C. Rep. 556, 559-560, (247).

the real complainant is the general community, the Commission will investigate the whole system of rates in which the community is interested.[18]

298. Parties Complainant.

Rule of Practice No. II provides as follows:

"Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or any common carrier, or the railroad commissioner or commission of any State or Territory, may complain to the Commission by petition, of anything done, or omitted to be done, in violation of the provisions of the Act to Regulate Commerce by any common carrier or carriers or other parties subject to the provisions of said Act. . . . ."

A voluntary association of individuals engaged in an industrial pursuit, although unincorporated, may properly bring a complaint.[19] The same is true of a State Railroad Commission.[20] The dissolution of such an association while the case is pending

Cf. also Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. Rep., 158, 171, (**24**).

No order can be issued upon an informal complaint and inquiry.

Re Proposed Adv. in Frt. Rates, 9 I. C. C. Rep. 382, 439, (**313**).

16th Ann. Rep. 17.

But see Re Allowances for Transportation, 14 I. C. C. Rep. 619, (**725**).

(18) Daniels v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 458, 479, (**200**).

(19) Vermont St. Gr. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, (**24**).

Boston Fruit & Pr. Ex. v. New York & N. E. R. Co., 4 I. C. C. Rep. 664, (**128-A**).

Milk Producers' Ass'n. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 162-3, (**220**).

Cattle Raisers' Ass'n. v. Fort Worth & D. C. R. Co., 7 I. C. C. Rep. 513, 534, (**245-A**).

Chicago Live Stock Exch. v. Chicago, G. W. R. Co., 10 I. C. C. Rep. 428, 447, (**364-A**).

Forest City Fr. Bur. v. Ann Arbor R. Co., 13 I. C. C. Rep. 109, 114, 118, 296, (**582**).

In the case last cited it was held that the fact that complainant could not be made to answer in costs if defeated on appeal was not a valid objection to its bringing the complaint before the Commission

California Com. Ass'n. v. Wells, Fargo & Co., 14 I. C. C. Rep. 422, 425, (**706**).

(20) Trammell v. Clyde S. S. Co., 5 I. C. C. Rep. 324, (**154-A**).

before the Commission does not affect the power of the Commission to entertain the complaint and decide it.[21]

Commission merchants are proper parties to bring a complaint with reference to rates in which they are interested.[22] An individual may institute a complaint in the name of a company to whose business he has succeeded.[23]

299. Must Damage to Complainant Appear?

Section 13 of the Act expressly provides that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant." Where a complaint is really on behalf of the general public or of a particular community, this provision is directly applicable,[24] but it would seem that some injury, either public or private, must appear to induce the Commission and the courts to investigate the cause of complaint.[25] Where, however, a party brings before the Commission a grievance of a strictly private nature, no public rights being involved, it would appear that, in order to secure the aid of the Commission, the complainant must show some actual injury to himself.[26] So, also, in actions for discriminations among individuals or preferences among localities, the complainant must show that he, or the lo-

(21) Florida R. Com. v. Savannah, F. & W. R. Co., 5 I. C. C. Rep. 13, (**137**).

(22) James v. Canadian Pac. R. Co., 5 I. C. C. Rep. 612, 615, (**165**).

(23) Savery v. New York, C. & H. R. R. Co., 2 I. C. C. Rep. 338, 343, 346, (**63**).

(24) I. C. C. v. Baird, 194 U. S. 25, 39; 24 Sup. Ct. 563; 48 L. Ed. 860, (**318-B**).

I. C. C. v. Detroit, G. H. & M. R. Co., 57 Fed. 1005, 1008, (**100-B**). (The Supreme Court ultimately refused to sustain the decree issued in this case, but not on the point for which it is here cited).

Re Grand Tr. Ry. of Canada, 3 I. C. C. Rep. 89, 109, (**78**).

Kindel v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 608, 623, (**288**).

(25) I. C. C. v. Baltimore & O. R. Co., 43 Fed. 37, 48, (**91-B**); (145 U. S. 263; 36 L. Ed. 699; 12 Sup. Ct. 844), (**91-C**).

(26) See Ottinger v. Southern Pac. R. Co., 1 I. C. C. Rep. 144, (**20**).

Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, 172, (**24**).

Milk Prod. Ass'n. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92, 164, (**220**).

McGrew v. Missouri Pac. R. Co., 8 I. C. C. Rep. 630, 641, (**289**).

cality which he represents, is actually harmed by the carrier's course of action.[27]

300. Investigations by the Commission of its Own Motion.

Section 13 of the Act gives the Commission authority to institute, on its own motion, investigations which it may see fit. Where carriers proposed to make an advance in the rate on a staple commodity affecting a large community, the Commission proceeded to investigate the justice of the advance on receipt of the tariff.[28]

Such an investigation will not be made where it appears that the carrier is in good faith doing its best to rectify abuses which have been called to its attention.[29]

Where a complainant fails to make out a private grievance, the Commission may nevertheless retain the case to investigate and correct violations of the Act which are revealed by the testimony.[30]

301. Parties Defendant.

(See Rule of Practice No. 11, infra, Appendix A; also supra, §44 and infra §§324 and 349).

The question as to who are proper or necessary parties defendant in actions before the Commission has most frequently arisen

(27) Savannah Bur. of Frt. v. Charleston & S. R. Co., 7 I. C. C. 601, 611, (250).
Cowan v. Bond, 39 Fed. 54, (80).
Knudsen Co. v. Michigan C. R. Co., 148 Fed. 968, 974; 79 C. C. A. 46, (441).
See also Allen v. Oregon R. & N. Co., 98 Fed. 16, 22-3, (270).
And cf. Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 220-1; 23 Sup. Ct. 268; 52 L. Ed. 493, (155-F).
Howell v. New York, L. E. & W. R. Co., 2 I. C. C. Rep. 272, 299, (59).
Lippman v. Illinois Cent. R. Co., 2 I. C. C. Rep. 584, 587, (73).

(28) Re Proposed Adv. in Frt. Rates, 9 I. C. C. Rep. 382, 437, (313).
See also Re Tariff & Classifications of Atlanta & W. P. R. Co., 3 I. C. C. Rep. 19, (1889).

(29) McMillan v. Western Cl. Com., 4 I. C. C. Rep. 276, (118).

(30) Smith v. Northern Pac. R. Co., 1 I. C. C. Rep. 208, (28).
Cf. Rice v. Western N. Y. & P. R. Co., 3 I. C. C. Rep. 87, (1889).
Heard v. Georgia R. Co., 3 I. C. C. Rep. 111, 122, (79).
See also Manning v. Chicago & A. R. Co., 13 I. C. C. Rep. 125, (585).
I. C. C. v. Harriman, 157 Fed. 432, (580-A); Harriman v. I. C. C., 211 U. S. 407, (580-B).

in proceedings to test the propriety of through joint rates. The Commission has repeatedly held that it will not pass on the reasonableness of such a rate unless all the carriers, parties to it, be joined as defendants.[31] In some such cases, however, it has issued an order directed to the carriers actually parties and provided that the order be served on the other carriers thereby affected and that they be directed to appear by a day certain and show cause why they should not also be bound by the order.[32] In one case the Commission held that a proceeding to test the propriety of the classification of a given commodity could be sustained against the initial carrier alone without the joinder of connecting lines, distinguishing such a case from one to test the reasonableness of through joint rates.[33]

(31) Allen v. L. N. A. & C. R. Co., 1 I. C. C. Rep. 199, (**27**).

Cf. Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, (**24**).

New Orleans Cot. Exch. v. Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. Rep. 375, 385, (**66**).

Michigan Congress Water Co. v. Chicago & G. T. R. Co., 2 I. C. C. Rep. 594, 601, and cases cited, (**74**).

Kentucky & Ind. Br Co. v. Louisville & N. R. Co., 2 I. C. C. Rep. 162, 217-218, (**57**-A).

Minneapolis Ch. of Com. v. Great Nor. R. Co., 5 I. C. C. Rep. 571, 580, (**163**).

Johnston Co. v. Wabash R. Co., 12 I. C. C. Rep. 51, 57, (**463**).

Cf. also Cattle Raisers' Ass'n. v. Chicago, B. & Q. R. Co., 10 I. C. C. Rep. 83, 110, (**245**-F).

National Petroleum Ass'n. v. Chicago, M. & St. P. R. Co., 14 I. C. C. Rep. 284, (**693**).

Anthony v. Phila. & P. R. R. Co., 14 I. C. C. Rep. 581, (**722**).

Allen v. Oregon R. & N. Co., 98 Fed. 16, 21; 106 Fed. 265, (**270**).

Tex. & Pac. R. Co. v. I. C. C., 162 U. S. 197, 255; 16 Sup. Ct. 666; 40 L. Ed. 940, (**122**-D).

I. C. C. v. Southern Pac. Co., 123 Fed. 597, (**302**-B).

(32) Hamilton v. Chattanooga R. & C. R. Co., 4 I. C. C. Rep. 686, 693, (**129**).

Toledo Pr. Ex. v. Lake Sh. & M. S. R. Co., 5 I. C. C. Rep. 166, 191-2, (**146**).

(33) Hurlburt v. Lake S. & M. S. R. Co., 2 I. C. C. Rep. 122, (**52**).

Cf. Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 548, 555, (**180**-C).

I. C. C. v. Southern Pac. Co., 123 Fed. 597, 599, (**302**-B).

A connecting carrier is not responsible for discriminations by the initial road in the distribution of cars.[34]

All roads parties to a through haul are severally responsible for the reasonableness of through rates [35] and for the observance of such, even beyond their individual lines.[36]

A boat line joining with rail connections in through rates is subject to the Act, although it is used by practically but one shipper, provided it is open to all who desire to employ it.[37]

Failure to join as a party defendant a road controlled wholly by one of the defendants is not a ground for objection by the latter.[38]

A Stockyard Company which does not itself haul live stock, merely making a charge per car against the railroad doing the hauling, is not subject to the regulation of the Commission as to rates for transporting live stock, although it does itself transport dead freight.[39]

Where a Holding Company controlled an extensive railroad system, including a Terminal Company which had made an exclusive lease of dockage facilities to a favored shipper, the Commission held that Holding and Terminal Companies were proper parties to proceedings designed to compel the cessation of the

(34) Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 221-2; 28 Sup. Ct. 268; 52 L. Ed. 493, (**155**-F).

Reversing Indep. Ref. Assn. v. Western N. Y. & P. R. Co., 6 I. C. C. Rep. 378, 385, (**155**-C).

(35) Cincinnati Frt. Bur. v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 232, (**183**-A).

(36) U. S. v. Standard Oil Co., 148 Fed. 719, 721, (**447**).

Cf., however, Crews v. Richmond & D. R. Co., 1 I. C. C. Rep. 401, 414-415, (**36**).

(37) Re Transportation of Salt, 10 I. C. C. Rep. 148, 165, (**342**).

(38) Lincoln Creamery v. Union Pac. R. Co., 5 I. C. C. Rep. 156, (**145**).

Wichita v. Atchison, T. & S. F. R. R. Co., 9 I. C. C. Rep. 534, 557, (**322**).

See also Brady v. Penna. R. Co., 2 I. C. C. Rep. 131, 139, (**53**).

Riddle & Co. v. New York, L. E. & W. R. Co., 1 I. C. C. Rep. 594, 601-602, (**43**).

(39) Cattle Raisers' Ass'o. v. Fort Worth & D. C. R. Co., 7 I. C. C. Rep. 513, 536, (**245**-A).

alleged preference to the lessee, although neither considered alone would come within the definition of a common carrier.[40]

A carrier is responsible for rates charged for icing by a Refrigerator Car Company with which it has an exclusive contract, where icing is necessary to the transportation.[41]

As to whether a lessor company is responsible for the rates charged by its lessee there would seem to be some doubt.[42]

In proceedings brought to test the propriety of the relation of rates to competing points, all localities affected by a change of the existing rate relation should be represented.[43]

The appointment of a receiver for one of the defendants during the pendency of the proceedings does not affect the validity of the proceedings against such defendant.[44]

Persons or carriers not parties may intervene on presenting a proper petition.[45]

(40) Eichenberg v. Southern Pac. Co., 14 I. C. C. Rep. 250, (**691**).

(41) Re Transportation of Fruit, 10 I. C. C. Rep. 360, (**357**-A); 11 I. C. C. Rep. 129, 137, (**357**-B).

(42) See Western N. Y. & P. R. Co. v. Penn Ref. Co., 137 Fed. 343, 357-358, (**155**-E), in support of the view that the lessor is not responsible in such cases.

The following decisions by the Commission take the opposite view:

Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. Rep. 153, 176, (**24**).

Alford v. Chicago, R. I. & P. R. Co., 3 I. C. C. Rep. 519, 528, (**95**).

Re Transportation of Fruit, 11 I. C. C. Rep. 129, 137, (**357**-B).

Indep. Ref. Ass'n. v. Western N. Y. & P. R. Co., 6 I. C. C. Rep. 378, 387, (**155**-C).

The federal decision above cited reversed the Commission in the Independent Refiners' case.

(43) Harwell v. Col. & W. R. Co., 1 I. C. C. Rep. 236, 250, (**31**).

(44) Trammell v. Clyde S. S. Co., 5 I. C. C. Rep. 324, 331, (**154**-A).

Loud v. South Car. R. Co., 5 I. C. C. Rep. 529, (**161**).

Troy Bd. of Tr. v. Alabama Mid. R. Co., 6 I. C. C. Rep. 1, 9, (**170**-A).

Evans v. Union Pacific R. Co., 6 I. C. C. Rep. 520, 527, (**203**).

Cf. also Reynolds v. Western N. Y. & P. R. Co., 1 I. C. C. Rep. 347, (1887).

Ruttle v. Pere M. R. Co., 13 I. C. C. Rep. 179, 186, (**595**).

Western N. Y. & P. R. Co. v. Penn Ref. Co., 137 Fed. 343, 346, (**155**-E).

See also Rule of Practice, No. II, infra, Appendix.

(45) Rule of Practice, No. II.

302. Pleadings.

(For Rules of Practice and Forms, see Appendix).

The petition or complaint, although properly simple in form, must be specific and must set out all the essential ingredients of the cause of action relied on.[46] It should specify particularly the rates complained of and the carriers who are exacting them.[47]

Rule of Practice No. III, relating to Complaints, is as follows:

"Complaints must be by petition setting forth briefly the facts claimed to constitute a violation of the law. The name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any, must appear upon the petition. The petition need not be verified. The complainant must furnish as many copies of the petition as there may be parties complained against to be served and three additional copies for the use of the Commission.

"The Commission will cause a copy of the petition, with notice to satisfy or answer the same within a specified time, to be served personally or by mail, in its discretion, upon each defendant."

Rule of Practice No. IV, relating to Answers, is as follows:

"A defendant must answer within twenty days from the date of the notice above provided for, but the Commission may, in a particular case, require the answer to be filed within a shorter time. The time prescribed in any case may be extended, upon good cause shown, by the Commission. The original answer must be filed with the Secretary of the Commission at its office in Washington, and a copy thereof at the same time served by the defendant, personally or by mail, upon the complainant, who must forthwith notify the Secretary of its receipt. The answer must

(46) See Delaware St. Gr. v. New York, P. & N. R. Co., 2 I. C. C. Rep. 309, 310, (1888).

White v. Michigan Cent. R. Co., 3 I. C. C. Rep. 281, (88).

See also San Bernardino Bd. of Tr. v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 104, 111, (110-A).

King v. New York, N. H. & H. R. Co., 4 I. C. C. Rep. 251, 260, (116).

(47) Nat. Petroleum As. v. Ann Arbor R. Co., 14 I. C. C. Rep. 272, 284, (692).

See also Nobles Bros. v. Fort W. & D. R. Co., 12 I. C. C. Rep. 242, 243, (505).

Roswell Com. Cl. v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 339, 346, (518).

specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial. If a defendant shall make satisfaction before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant, and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written acknowledgment must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the defendant."

The answer should be especially full in stating facts within the carrier's peculiar knowledge.[48]

Instead of answering or formally demurring, a defendant who deems the petition insufficient to show a cause of action may serve on the defendant and file with the Commission a notice of hearing on the petition alone. The filing of an answer does not, however, amount to an admission of the sufficiency of the petition, and a motion to dismiss may, after answer filed, be made at the hearing.[49]

No replication is required or permitted.[50]

Amendments are liberally allowed, but an amendment will not be permitted which introduces a new and distinct cause of action.[51]

(48) Raworth v. Northern Pac. R. Co., 5 I. C. C. Rep. 234, 238, (148).

(49) Rule of Practice, No V., is as follows:—

"A defendant who deems the petition insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted. A copy of the notice must at the same time be filed with the secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing."

(50) Re Procedure 1 I. C. C. Rep. 223, 224, (1887).

Oregon Sh. L. v. Northern Pac. R. Co., 3 I. C. C. Rep. 264, (1889).

(51) Riddle, et al. v. Baltimore & O. R. Co., 1 I. C. C. Rep. 372, (1888).

Delaware St. Gr. v. New York, P. & N. R. Co., 2 I. C. C. Rep. 309, (1888).

The burden of proving facts denied in the answer is on the complainant.[52] Facts averred in the complaint and not denied in the answer are taken as admitted by the defendant.[53]

Points not raised by the complaint or answer are not considered to be before the Commission for adjudication.[54] No opinion will be given on matters raised by the pleadings but not supported by evidence or pressed in argument.[55]

Where the facts are all admitted, the case will be disposed of on complaint and answer without formal hearing.[56]

Cases must be prosecuted with reasonable diligence and when assigned for hearing the parties must be present, or request a postponement on reasonable grounds before the time fixed.[57] Dila-

La Salle & R. B. C. Co. v. Chicago & N. W. R. Co., 13 I. C. C. Rep. 610, 612-613, (**651**).
Crutchfield v. Louisville & N. R. Co., 14 I. C. C. Rep. 558, (1908).
Rule of Practice, No. VII.

(52) King v. New York, N. H. & H. R. Co., 4 I. C. C. Rep. 251, 263, (**116**).
Rule of Practice, No. X.

(53) Perry v. Florida C. & P. R. Co., 5 I. C. C. Rep. 97, 101, (**142**); Rule of Practice, No. X.

(54) Raymond v. Chicago, M. & St. P. R. Co., 1 I. C. C. Rep. 230, 236, (**30**).
See also Omaha Commercial Cl. v. Chicago, R. I. & P. R. Co., 6 I. C. C. Rep. 647, 677, (**212**).
Rice v. Atchison, T. & S. F. R. Co., 4 I. C. C. Rep. 228, 248, (**115**).
Kindel v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 608, 629, (**288**).
Davies v. Pere M. R. Co., 10 I. C. C. Rep. 405, (**361**).
Roswell Com. Cl. v. Atchison, T. & S. Fr. Co., 12 I. C. C. Rep. 339, 346, (**518**).

(55) Rice v. Louisville & N. R. Co., 1 I. C. C. Rep. 503, 529, (**42**).

(56) Roth v. Texas & P. R. Co., 9 I. C. C. Rep. 602, (**326**).

(57) Producers, etc. Co. v. St. Louis, I. M. & S. R. Co., 12 I. C. C. Rep. 186, (1907).
See also Patten v. Wisconsin Cent. Ry. Co., 14 I. C. C. Rep. 189, (**682**).
Kansas City Asso. v. Missouri P. R. Co., 14 I. C. C. Rep. 597, (**723***).
Ullman v. Adams Exp. Co., 14 I. C. C. Rep. 585, (**701**-B).
In the case last cited the Commission held that oral argument and the filing of briefs, although usually permitted, were not essential to the "full hearing" required by the Act.

tory proceedings are condemned.[58] Where complainant does not appear at the hearing, a copy of the answer having been served on him, the case will be dismissed, the Commission assuming that he is satisfied.[59]

The complainant will not be permitted to shift his ground of complaint and advance a new theory of recovery at the argument, after he sees that on his original theory his case will fall.[60]

The Commission may of its own motion proceed to investigate further any violation of the Act which the evidence discloses.[61]

303. Evidence.

(As to Depositions, see Rule of Practice No. X, infra, Appendix).

The attention of the Commission is directed toward "the ascertainment of the facts, rather than to the method of their ascertainment." [62] It is not constrained, in its admission of evidence, by technical common law rules.[63] There are therefore but few decisions by the Commission bearing on questions of evidence. Questions of burden of proof are discussed elsewhere.[64] Testi-

(58) Re Procedure 1 I. C. C. Rep. 223, 224, (1887).
Independent Ref. Ass'n. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 426, (**155**-A).
Independent Ref. Ass'n. v. Penna. R. Co., 6 I. C. C. Rep. 52, 58, (**155**-B).
Rice v. Western N. Y. & P. R. Co., 6 I. C. C. Rep. 455, (**199**).

(59) Jackson v. St. Louis, A. & T. R. Co., 1 I. C. C. Rep. 184, (1887).
See also supra §296.

(60) Martin v. Chicago, B. & Q. R. Co., 2 I. C. C. Rep. 25, (**47**).
See also Providence Coal Co. v. Providence & W. R. Co., 1 I. C. C. Rep. 107, 116, (**17**).

(61) See Smith v. Northern Pac. R. Co., 1 I. C. C. Rep. 208, (**28**).
Business Men's Ass'n. v. Chicago & N. W. R. Co., 2 I. C. C. Rep. 73, 88, (**50**).
Heard v. Georgia R. Co., 3 I. C. C. Rep. 111, 122, (**79**).

(62) Toledo Pr. Ex. v. Lake S. & M. S. R. Co., 5 I. C. C. Rep. 166, 178, (**146**).

(63) I. C. C. v. Baird, 194 U. S. 25, 44; 24 Sup. Ct. 653; 48 L. Ed. 860, (**318**-B).
Benton Tr. Co. v. Benton Har., St. Jo. Ry. & L. Co., 13 I. C. C. Rep. 542, 545-546, (**641**).
See also Export Sh. Co. v. Wabash R. Co., 14 I. C. C. Rep. 437, 459, (**707**); (dissenting opinion).

(64) See supra §92.

mony as to rates not specified in the complaint is not admissible and the Commission will not pass upon their reasonableness unless the complaint be amended so as to set them out specifically.[65]

The Commission will take judicial notice of tariffs and agreements on file with it, although these are not formally offered in evidence.[66] Declarations by a station agent as to the fitness of a car, which it was not his duty to inspect, do not bind the railroad.[67]

The Commission will consider the opinions of experts on questions of the reasonableness of rates but they must state the reasons for their opinions in order to make them of any value.[68] A published tariff, however, speaks for itself and the Commission will not consider the opinion of a railroad expert as to its meaning.[69]

The Commission and the Courts have both condemned the practice of withholding important evidence until after the hearing before the Commission, and producing it subsequently on petition to take additional testimony before the Commission or at the hearing before the Court.[70]

(65) Nobles Bros. v. Fort W. & D. R. Co., 12 I. C. C. Rep. 242, 243, (505).

See also Roswell Com. Cl. v. Atchison, T. & S. F. R. Co., 12 I. C. C. Rep. 339, 346, (518).

(66) Boston Fr. & Pr. Ex. v. New York & N. E. R. Co., 4 I. C. C. Rep. 664, 679, (128-A).

(67) Michigan Cong. Water Co. v. Chicago & G. T. R. Co., 2 I. C. C. Rep. 594, 603, (74).

(68) In St. Louis Tr. Bur. v. Missouri Pacific R. Co., 13 I. C. C. Rep. 105, 106, (1908), Prouty, C., said:

"The time has gone by when the mere statement of a traffic opinion which can not be supported by some assignable reason can be of much weight with this body."

See also supra §102.

(69) Hurlburt v. Lake S. & M. S. R. Co., 2 I. C. C. Rep. 122, 126, (52).

See also Mannheim Ins. Co. v. Erie & W. Tr. Co., 72 Minn. 357; 75 N. W. 602, (1898).

Smith v. Great Nor. R. Co., —— N. Dak. ——; 107 N. W. 56, (1906).

(70) Independent Ref. Assn. v. Penna. R. Co., 6 I. C. C. Rep. 52, 58, (155-B); Rule of Practice No. X.

Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184, 196, 16 Sup. Ct. 700; 40 L. Ed. 935, (132-C).

304. Evidence—Production of Books and Papers.

(See Rules of Practice Nos. XI and XII, infra, Appendix).

In requiring the production of books and papers the Commission follows the practice of the Federal Courts.[71]

It will not insist on the production of voluminous documents, the contents of which are not clearly relevant, or where the matters to be proved by the books may be proved as well by witnesses.[72] In case the books required are those of a carrier subject to the Act, the rule is less stringent as to what will be necessary to warrant the Commission in ordering their production, than where the books of other witnesses are demanded.[73] The Commission uses its discretion in any case.

Where a tedious and elaborate examination of books and papers is necessary, the Commission will have this testimony taken before a Commissioner not a member of its own body.[74]

305. Immunity of Witnesses.

The original Act of 1887 provided that no witness be excused from testifying on the ground that the evidence might incriminate him. It was held that this was not a sufficient protection to the witness,[75] and subsequently the Testimony Act of February 11, 1893,[76] gave a witness so testifying absolute immunity from prosecution for the matters testified to by him. The latter Act is constitutional and under it the witness cannot refuse to answer.[77]

(71) Rice v. Cincinnati, W. & B. R. Co., 3 I. C. C. Rep., 186, 206-207, (83).

(72) Haddock v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 296, 323, (120).

(73) See discussion of principles and requirements in Rice v. Cincinnati, W. & B. R. Co., 3 I. C. C. Rep. 186, 212, (83).

(74) Haddock v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 296, 324, (120).

See pars. 4, 5 and 6, of Section 12, supra, p. 20; also Rule of Practice, No. X, infra, Appendix.

(75) Counselman v. Hitchcock, 142 U. S. 547; 12 Sup. Ct. 195; 35 L. Ed. 1110, (1892), reversing 44 Fed. 268, 271, (1890).

(76) See supra, p. 50.

(77) Brown v. Walker, 70 Fed. 46, (1895); 161 U. S. 591; 16 Sup. Ct. 644; 40 L. Ed. 819, (1896).

See U. S. v. James, 60 Fed. 257, (1894), *contra*.

This Act does not protect a corporation whose officers have testified,[78] nor can an officer of a corporation refuse to testify on the ground that his testimony may tend to incriminate the corporation.[79]

306. Personal Inspection by Commission.

In the course of a proceeding the Commission will occasionally of its own motion, personally inspect the conditions, the subject matter of dispute.[80]

307. Damages Before the Commission.

Section 8 of the Act provides for compensation to parties injured by violation of the Act.[81]

Section 9 provides the procedure for recovering such damages, either by complaint to the Commission, or by suit in court, but requires the election between the two remedies.[82]

(78) Re Pooling Freights, 115 Fed. 588, (1902).

(79) International Coal Mining Co. v. Penna. R. Co., 152 Fed. 557, and cases cited, (1907).

As to the extent of the exemption created by this Act see also U. S. v. Price, 96 Fed. 960, (1899).

(80) Savery v. New York Cent. & H. R. R. Co., 2 I. C. C. Rep. 338, 357, (63).

(81) This provision is as follows:

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs of the case."

(82) This provision is as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein

As heretofore stated [83] the power of the Commission to award damages is limited to those suffered as a result of violations of the Act. The principal causes of action giving rise to claims for damages under the Act are the exaction of unreasonable rates, discriminations or preference in rates, service, or facilities, charges greater than published rates, and failure to post rates.

308. Same Subject—Nature of Claim for Damages for Excessive charges.

In Southern Pine Lumber Co. *v.* Southern Ry. Co.,[84] Commissioner Clements said:

"Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions at law sounding in tort. . . . . If an injury is sustained on account of a violation of law, the proceeding is in its nature *ex delicto,* and therefore carries with it none of the features or incidents of an action *ex contractu.*"

A claim under the Act for damages on account of overcharges has been held to be assignable.[85]

309. Same Subject—Actions for Damages for Excessive Tariff Rates Must be Begun Before the Commission.

Where a rate, duly published and filed, is excessive, the only method of securing reparation for its exaction is by a proceeding before the Commission.[86] Under these circumstances the Courts have no jurisdiction until after the Commission has declared the

provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

See also Section 13, quoted supra, §297, note 15.

(83) Supra §264.

(84) 14 I. C. C. Rep. 195, 197, (684).

(85) Edmunds v. Illinois Cent. R. Co., 80 Fed. 78, (1897).

(86) See supra §240, et seq.

rate unreasonable. The Commission, however, may award damages in such a case,[87] and if damages be awarded, the carrier is entitled to have a jury pass upon the question. No damages may be recovered before a jury which were not claimed before the Commission.[88]

310. Same Subject—Practice in Cases Where Carrier is Willing to Refund Excess.

Even where a carrier recognizes that a tariff charge was excessive, it may not make refund of the excess without the specific order of the Commission[89] and decisions in similar cases, although controlling in principle, do not authorize such refunds.[90] In cases, however, where the carrier recognizes its duty to refund, the Commission has adopted the practice of making orders authorizing such payments on informal complaint. Such orders will be made only where the carrier admits the unreasonableness of the rate charged and where the claim is filed within six months and within that period the carrier has, by tariff duly filed, reduced the rate in question to the figure on the basis of which reparation is claimed.[91] This practice does not apply to passenger rates.[92]

311. Same Subject—Proof Necessary to Sustain Action for Unreasonable Charges.

In order to recover for charging more than reasonable rates,

(87) Cattle Raisers' Ass'n. v. Fort Worth & D. C. R. Co., 7 I. C. C. Rep., 513, 553-554, (245-A).
Coomes v. Chicago, M. & St. P. R. Co., 13 I. C. C. Rep. 192, (597).
Nicola Co. v. Louisville & N. R. Co., 14 I. C. C. Rep. 199, 204, (685).
Flint Co. v. Lake Shore & M. S. R. Co., 14 I. C. C. Rep. 336, (700).
See also supra §240 et seq.

(88) Western N. Y. & P. R. Co. v. Penn Refining Co., 137 Fed. 343, 355-356, (155-E).

(89) Goff-Kirby Co. v. Bessemer & L. E. R. Co., 13 I. C. C. Rep. 383, 387, (623).
See also supra §244.

(90) Tar. Circ. 15-A-Ruling No. 81, (June 7th, 1907).
Admin. Rul. No. 49, (March 9, 1908).
And cf. Howard Supply Co. v. Chesapeake & O. R. Co., 162 Fed. 183, (628).

(91) Tar. Circ. 15-A-Ruling No. 81, (June 7th, 1907).
Admin. Rul. No. 38, (Feb. 4th, 1908).

(92) Admin. Rul. No. 46, (Mar. 3rd, 1908).

a complainant must clearly prove facts fixing definite damages;[93] he must show not merely the wrong of the carrier but that this wrong operated to his injury.[94] He must prove that the rate charged exceeded a reasonable figure and by how much,[95] and also that the rate charged was unreasonable at the time it was charged and paid.[96]

312. Same Subject—Excessive Charges Need not have been Paid Under Protest.

In order to entitle a complainant to recover excess charges, these need not have been paid under protest,[97] and the payment of excessive or discriminating rates, in violation of the various provisions of the Act, does not preclude recovery on the ground that these are voluntary payments.[98]

(93) Perry v. Florida Cent. R. Co., 5 I. C. C. Rep. 97, 118-119, (**142**).

See also Oshkosh Co. v. Chicago & N. W. R. Co., 14 I. C. C. Rep. 109, 110, (**672**).

(94) Parsons v. Chicago & N. W. R. Co., 167 U. S. 447, 460; 42 L. Ed. 232; 17 Sup. Ct. 887, (**188-B**).

(95) Holmes v. Southern R. Co., 8 I. C. C. Rep. 561, 567, (**284**).

(96) Grain Shippers' Ass'n. v. Illinois Cent. R. Co., 8 I. C. C. Rep. 158, 183, (**263**). As to so-called shifting of burden of proof of reasonableness of rates by increase of a long continued schedule, and as to whether a reduction of a given rate on complaint amounts to an admission of its prior unreasonableness, see supra, §85-87.

(97) Baer Bros. Co. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 329, 337-340, (**617**).

Southern Pine Co. v. Southern R. Co., 14 I. C. C. Rep. 195, (**684**).

Nicola v. Louisville & N. R. Co., 14 I. C. C. Rep. 199, 205, (**685**).

But see Knudsen Co. v. Chicago, St. P., M. & O. R. Co., 149 Fed. 973, (1906).

Strough v. New York Cent. & H. R. R. Co., 87 N. Y. Supp. 30; 92 App. Div. 584; 181 N. Y. 533; 73 N. E. 1133, (1904).

(98) Louisville, E. & St. L. Con. R. Co. v. Wilson, 132 Ind. 517; 32 N. E. 311; 18 L. R. A. 105n.

See also Murray v. Chicago & N. W. R. Co., 92 Fed. 24, 45, (1894); 92 Fed. 868; 35 C. C. A. 62, (1899).

Ohio Coal Co. v. Whitcomb, 123 Fed. 359, 362-363; 59 C. C. A. 487, (**315**).

313. Same Subject—Damages not Awarded in Every Case Where Rates are Declared Unreasonable.

The Commission will not award damages in every case in which it declares the rate complained of unreasonable,[99] especially where the claims were not promptly presented and actively prosecuted.[100] If damages are not claimed until after the hearing, they will not be awarded except in special cases.[101]

314. Same Subject—Measure of Damages for Unreasonable Charges.

Where by reason of excessive rates a party is prevented from shipping, he has been held entitled to recover the difference between the cost of transportation at reasonable rates and the value of the goods at destination,[102] but this decision is exceptional.[103] The measure of damages in such cases is ordinarily the difference between the rates paid on actual shipments and the reasonable rate which should have been charged.[104]

(99) James & Abbott v. Canadian Pac. R. Co., 5 I. C. C. Rep. 612, 634, (**165**).

Johnson v. Chicago, St. P., M. & O. R. Co., 9 I. C. C. Rep. 221, 244, (**305**).

Riverside Mills Co. v. Southern R. Co., 12 I. C. C. Rep. 388, 391, (**524**).

Farmers' Warehouse Co. v. Louisville & N. R. Co., 12 I. C. C. Rep. 457, 459, (**537**).

Missouri & Kas. Sh. Ass'n. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep., 433, (**545**).

Raven Red Co. v. Norfolk & W. R. Co., 13 I. C. C. Rep. 230, 237, (**602**).

Goff-Kirby Co. v. Bessemer & L. E. R. Co., 13 I. C. C. Rep. 383, 386, (**623**).

Thompson Co. v. Illinois Cent. R. Co, 13 I. C. C. Rep. 657, 667, (**658**).

Oregon & W. As. v. Union Pac. R. Co., 14 I. C. C. Rep. 1, (**661**), and cases following.

(100) Burgess v. Transcontinental Fr. Bur., 13 I. C. C. Rep. 668, 680, (**659**).

(101) Dallas Frt. Bur. v. Gulf, C. & S. F. R. Co., 12 I. C. C. Rep., 223, 228, (**501**).

(102) Hope Cotton Oil Co. v. Texas & Pac. R. Co., 10 I. C. C. Rep. 696, 704, (**380**).

But see Koch v. Louisville & N. R. Co., 13 I. C. C. Rep. 523, 525, (**638**).

(103) See also infra. §320.

(104) Perry v. Florida C. & P. R. Co., 5 I. C. C. Rep. 97, 118-119, (**142**).

Burgess v. Transcontinental Fr. Bur., 13 I. C. C. Rep. 668, 679-680, (**659**).

Speculative damages cannot be recovered where no actual damage is proved.[105]

315. Same Subject—Charges for Incidental Services.

Damages may be recovered for unreasonable charges for incidental services, such as refrigeration, as well as for excessive charges for transportation proper.[106]

316. Same Subject—Charges in Excess of Tariff.

A party charged more than the published rate may recover the excess by proceedings before the Commission.[107] This should properly be refunded without an order from the Commission.[108]

317. Same Subject—Discrimination Cases—Nature of Action for Damage in Such Cases.

An action for damages for discrimination has been held to be in the nature of one for a penalty or forfeiture, to which a strict rule of construction should apply.[109] One circuit court has held that the Statute of Limitations governing actions for penalties and forfeitures applied to such a case,[110] while another has

(105) Perry v. Florida C. & P. R. Co., 5 I. C. C. Rep. 97, 119, (**142**).
Cf. also Fewell v. Richmond & D. R. Co., 7 I. C. C. Rep. 354, 375, (**237**).
Frye v. Northern Pac. R. Co., 13 I. C. C. Rep. 501, 512, (**635**).
See also supra, §314.

(106) Re Transportation of Fruit, 11 I. C. C. Rep. 129, 144, (**357-B**).

(107) Suffern v. Indiana, D. & W. R. Co., 7 I. C. C. Rep. 255, 285, (**232**).
Chicago, F. P. Co. v. Chicago & N. W. R. Co., 8 I. C. C. Rep. 316, 328, (**269**).
Diamond Mills v. Boston & M. R. Co., 9 I. C. C. Rep. 311, 317, (**310**).
Dewey v. Baltimore & O. R. Co., 11 I. C. C. Rep. 475, 480, (**408**).
Wellington v. St. Louis & S. F. R. Co., 13 I. C. C. Rep. 534, (1908).
Katzmaier v. Atchison, T. & S. F. R. Co., 14 I. C. C. Rep. 528, (1908).

(108) Michel Gr. Co. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 566, 568, (**643**).
Forster Co v. Duluth, S. S. & A. R. Co., 14 I. C. C. Rep., 232, 236, (**688**).

(109) Parsons v. Chicago & N. W. R. Co., 167 U. S. 447, 455; 17 Sup. Ct. 887; 42 L. Ed. 232, (**188-B**).

(110) Ratican v. Terminal R. Assn., 114 Fed. 666, (1902).

taken the opposite view.[111] It would seem difficult, however, to find in the Act any intention to award to shippers anything but compensation for injuries received through violation of the provisions of the Act. The penalties and forfeitures provided go not to the shipper but to the Government and all that the shipper receives is compensation. On the other hand, it would seem almost impossible, in practically all cases of discriminations in rates, to prove actual damages, suffered by reason of the concession to the favored shipper. Of course it is easy to calculate the amount of loss by reason of the complainant's not being charged the *lower* rate, but it does not follow that the same loss resulted from the fact that the favored shipper was not charged the *higher* rate. The latter would seem to be the essential consideration.

318. Same Subject—Measure of Damages in Cases of Discrimination in Charges.

No case has been found under our Act discussing the question of the measure of damages for discrimination in rates between shippers.[112] While in cases involving unreasonable rates the amount of recovery is clearly based on the amount of the complainant's shipments, in discrimination cases the gist of the cause of action consists not in an excessive charge to him but in a preference of his rival. A charge

(111) Carter v. New O. & N. E. R. Co. 143 Fed. 99; 74 C. C. A. 293, (417).

(112) In Morgan v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 525, (554), it appeared that a certain through tariff rate, under which complainant had shipped, was higher than the combined locals and that although complainant had been required to pay the tariff through rate, others had been allowed to ship at the sum of the locals. Complainant claimed reparation, but the parties did not seem to consider the question of awarding damages for discrimination, and the Commission, finding that the through tariff rate was not unreasonable, dismissed the complaint and sent the record to the department of prosecutions.

In International Coal Mining Co. v. Pennsylvania R. Co., 162 Fed. 996, (660), the question of the measure of damages in such cases was involved but was not discussed by the court. From counsel it is learned that Judge Holland ruled that the measure of damages must be based on the amount of complainant's shipments, irrespective of the amount of those to the favored shipper, and that he rejected the rule laid down by the English courts in the Denaby Main Colliery case cited below. An appeal from this decision is now pending in the Circuit Court of Appeals, Third Circuit, but the case may turn on points not involving a construction of the Interstate Commerce Act. From the facts as stated to the ap-

of $1.00 per ton on 100 tons may be reasonable *per se,* but improper in view of the charge of 50 cents per ton to a competing shipper. In the latter case, if it appeared that the favored shipper had shipped but 50 tons at the reduced rate, the carrier would seem to have committed no discrimination if it had hauled 50 tons out of complainant's 100 at the 50-cent rate. Complainant's damages in such a case should therefore be limited to the amount of shipments for the favored party, and it has been so held under the English Act.[113] It would seem that the damages should also be limited by the amount complainant actually shipped or tendered for shipment at reasonable rates.

In the decisions under our Act awarding damages for discriminations, preferences, or for violations of Section 4, no attention has been paid to the amount of the shipments for the favored shipper or locality and this fact would seem to make against an acceptance by our Courts of the view above stated. Unless it be adopted, however, it is difficult to see how, if a carrier gave a certain shipper a special rate on but 100 pounds of goods, all other shippers could be prevented from insisting on having transported at that rate as much of the commodity in question as they chose to tender. If a carrier, during a given season hauled a carload of coal free for one not entitled to this privilege, the carrier should be prosecuted, but it would certainly not seem reasonable that every other shipper should recover back all the coal freight paid during that season.

pellate court it would appear that the favored shipper had not received concessions on all his shipments, but only on a certain class of traffic, amounting to a small percentage of his total tonnage. Counsel for the railroad argued that the measure of damages should not be based upon the total tonnage of complainant's shipments, even though this was less than the total tonnage on which his competitors received rebates, but that he was entitled to damages only in respect to the same proportion of his own tonnage as that part of his rival's traffic on which rebates were received bore to the latter's total tonnage.

In this case Judge Holland charged the jury that plaintiff could not recover any damages for discriminations during years in which he himself had received rebates, such rebates not having been as large as those allowed his competitors.

See also supra, §292.

(113) Denaby Main Colliery Co. v. Manchester, S. & L. R. Co., 11 App. Cas. 97, 117.

319. Same Subject—Measure of Damages for Discrimination in Facilities.

Damages for discrimination have been claimed most frequently in cases of alleged preference in car distribution.[114] In such cases there is obviously no fixed measure of damages, this being based on the actual loss suffered by complainant by reason of the defendant's violation of its duty under the Act. Although loss of profits may be recovered in such cases,[115] the damages proved must be actual and clearly shown, and not merely speculative.[116]

Damages suffered by reason of an embargo on a particular shipper's traffic at a certain station may be recovered, to the extent of the fall in the market price of the commodity during the period of the embargo, and the extra expense of using a less convenient station.[117]

320. Same Subject—Measure of Damages for Preferences Between Localities and for Violation of Section 4.

In case of preferences in rates among competing localities or of unjustified charges for the less than for the greater distance, the measure of damages, under the decided cases, would seem to be the difference in the rates multiplied by the amount of complainant's actual shipments.[118] In other words, if complain-

(114) Independent Ref. Ass'n. v. Penna. R. Co., 6 I. C. C. Rep. 449, (155-C).
Hawkins v. Lake S. & M. S. Co., 9 I. C. C. Rep. 207, 212, (303).
Glade Coal Co. v. Baltimore & O. R. Co., 10 I. C. C. Rep. 226, (347).
Paxton Tie Co. v. Detroit So. R. Co., 10 I. C. C. Rep. 422, (363).

(115) Eaton v. Cincinnati, H. & D. R. Co., 11 I. C. C. Rep. 619, (431).

(116) Gardner & Clark v. Southern R. Co., 10 I. C. C. Rep. 342, (355).
Richmond El. Co. v. Pere Marquette R. Co., 10 I. C. C. Rep. 629, (372).
See also Gallogly v. Cincinnati, H. & D. R. Co., 11 I. C. C. Rep. 1, (381), and Rogers v. Philadelphia & R. R. Co.. 12 I. C. C. Rep. 308, 311, (513).
See also supra §314.

(117) Rogers v. Philadelphia & R. R. Co., 12 I. C. C. Rep. 308, 311, (513).

(118) Osborne v. Chicago & N. W. R. Co., 48 Fed. 49, 56, (138-A).
Gardner & Clark v. Southern R. Co., 10 I. C. C. Rep. 342, 349-350, (355).
See also Lynchburg Bd. of Tr. v. Old Dom. S. S. Co., 6 I. C. C. Rep., 632, 645-6, (211).
City Gas Co. v. Baltimore & O. R. R. Co., 11 I. C. C. Rep. 371, 381, (401).

ant shipped but 10 tons at $1.50 per ton and his competitor at a nearby point with a 50-cent rate shipped 100 tons, complainant would recover $5 damages. In thus reckoning damages, no account is taken of the loss of business to the prejudiced shipper. If the rate allowed the favored locality was so low as to give its merchants all the business, and make it impossible for complainant to ship in competition with them, he could thus recover no damages unless for that purpose he shipped his goods at a loss. This rule would seem inconsistent with the decision of the Commission in Hope Cotton Oil Co. *v.* Texas Pac. Co. above referred to,[119] where it was held that a shipper need not ship at an excessive rate in order to entitle him to damages under Section 1.

321. Same Subject—Failure to Post Rates.

Although the Act provides for damages for failure on the part of carriers to file and post rates in accordance with Section 6, such damages may be recovered only when the failure by the carrier is wilful, and where the shipper shows actual injury resulting to him through the omission to post the rates.[120] When the actual rate charged was notorious, of course, no actual damage to the shipper can be shown.[121] No case has been found where damages have been awarded for failure to post rates.

322. Same Subject—Interest and Counsel Fees.

Interest will be awarded on overcharges[122] or on damages

(119) 10 I. C. C. Rep. 696, 704, (**380**).

Cf. also Eaton v. Cincinnati, H. & D. R. R. Co., 11 I. C. C. Rep. 619, (**431**).

(120) Florida R. Com. v. Savannah, F. & W. R. Co., 5 I. C. C. Rep. 13, 26-7, (**137**).

Independent Ref. Assn. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 458, (**155-A**).

Loud v. South Car. R. Co., 5 I. C. C. Rep. 529, 541, (**161**).

Parsons v. Chicago & N. W R. Co., 167 U. S. 447, 459; 42 L. Ed. 232; 17 Sup. Ct. 887, (**188-B**).

(121) Florida R. Com. v. Savannah, F. & W. R. Co., 5 I. C. C. Rep. 13, 27, (**137**).

I. C. C. v. Detroit, G. H. & M. R. Co., 167 U. S. 633, 645; 42 L. Ed. 306; 17 Sup. Ct. 986, (**100-D**).

(122) Pitts & Son v. St. Louis & S. F. R. Co., 10 I. C. C. Rep. 684, 689, (**378**).

Koch v. Louisville & N. R. Co., 13 I. C. C. Rep. 523, 525, etc., (**638**).

proved under Section 4,[123] from the time of the payment of such charges to the railroad.

Where an association of individuals has filed a complaint asking damages, and has established its cause of action, the individual members have then been permitted to file specifications of the amount of damage which each has suffered. Orders have thereupon been issued awarding to each the amount proved.[124]

The Commission has no power to award a counsel fee in damage cases, this power being limited, under Section 8, to the Courts.[125]

323. Parties Entitled to Damages.

Reparation will be awarded to the party who paid the overcharges in question, or on whose account they were paid, or who was the true owner of the property transported at the period of transportation. The Commission will not go into the question as to who is the one ultimately injured by the exaction of the overcharge.[126]

324. Parties Responsible for Damages.

(See also supra, §§44 and 301).

All of the carriers, parties to a through haul, are responsible severally, for the entire damages suffered by a shipper by reason of the whole shipment, even though each road received but a part of the entire rate.[127] Carriers, however, who merely concurred in

(123) Osborne v. Chicago & N. W. R. Co., 48 Fed. 49, 57, (**138**-A).

(124) Florida R. Com. v. Savannah, F. & W. R. Co., 5 I. C. C. Rep. 13, 43, (**137**).

Cattle Raisers' Ass'n. v. Chicago, B. & Q. R. Co., 10 I. C. C. Rep. 83, 97, (**245**-F).

Independent Ref. Ass'n. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 464; 6 I. C. C. Rep. 378, (**155**-A).

See also Michigan Box Co. v. Flint & P. M. R. Co., 6 I. C. C. Rep. 335, (**196**).

(125) Councill v. Western & A. R. Co., 1 I. C. C. Rep., 339, (**33**).

See the provision in question, supra §307.

(126) Nicola Co. v. Louisville & N. R. Co., 14 I. C. C. Rep. 199, 207-209, (**685**).

(127) Cincinnati Fr. Bur. v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 232, (**183**-A).

See also Ohio Coal Co. v. Whitcomb, 123 Fed. 359; 59 C. C. A. 487, (**315**).

United States v. Standard Oil Co., 148 Fed. 719, 721, (**447**).

an unlawful advance in rates, are not responsible for the exaction of the increased charges on shipments in which they did not participate,[128] and connecting lines are not responsible for car-discriminations by the initial road.[129]

As to whether a lessor road is responsible in damages for rates charged by its lessee there would seem to be some doubt.[130]

325. Limitation of Actions.

When no time was specified in the Act limiting the bringing of actions for damages, it was held that this was governed by the Statutes governing similar cases in the State in which the proceedings were instituted.[131]

Where proceedings are begun before the Commission to secure an order and reparation, the statute is tolled during the Commission's application to the Court to enforce its order, and all proceedings date back to the filing of the original complaint.[132]

In the case last cited the Commission held that this was true even as regards petitioners intervening after the filing of the

(128) Nicola Co. v. Louisville &. N. R. Co., 14 I. C. C. Rep. 199, 209, (**685**).

Cf. Crews v. Richmond & D. R. Co., 1 I. C. C. Rep. 401, 415-416, (**36**).

(129) Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 221-222; 28 Sup. Ct. 268; 52 L. Ed. 493, (**155**-F).

(130) See Western N. Y. & P. R. R. Co. v. Penn Ref. Co., 137 Fed. 343, 357-358, (**155**-E), in support of the view that the lessor is not responsible in such cases.

The following decisions by the Commission take the opposite view:

Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. Rep. 158, 176, (**24**).

Alford v Chicago, R. I. & P. R. Co., 3 I. C. C. Rep. 519, 528, (**95**).

Re Transportation of Fruit, 11 I. C. C. Rep. 129, 137, (**357**-B).

Indep. Ref. Ass'n. v. Western N. Y. & P. R. Co., 6 I. C. C. Rep. 378, 387, (**155**-C).

The federal decision above cited reversed the Commission in the Independent Refiners' case.

(131) Copp v. Louisville & N. R. Co., 50 Fed. 164, (1892).

Ratican v. Terminal R. Ass'n., 114 Fed. 666, (1902).

Carter v. New Orleans & N. E. R. Co., 143 Fed. 99; 74 C. C. A. 293, (**417**).

See supra §317 as to whether or not statutes limiting actions for penalties or forfeitures are applicable to actions for discrimination.

(132) Cattle Raisers' Ass'n. v. Chicago, B. & Q. R. Co., 10 I. C. C. Rep. 83, 104, (**245**-F).

complaint, whose names did not appear on the original petition. This case, although not expressly referred to, would seem to have been overruled by the Commission in its recent decision in Missouri and Kansas Shippers' Assn. *v.* Atchison, T. & S. F. R. Co.[133] It was there held that a petition by a voluntary association, for reparation, did not toll the statute unless it named the actual parties in interest and specified the particular shipments relied on for damages.

The Amendment of 1906 limits actions for damages to two years after their accrual, claims accruing prior to the passage of the Act to be presented within one year.[134] The Commission has held that claims presented on August 28, 1907, for damages accrued prior to June 29, 1907, were barred.[135]

In a later case it has held that the words "prior to the passage of this Act" refer not to June 29th, 1906, when the Act was passed, but to August 28th, 1906, when, by virtue of the Joint Resolution of June 30th, 1906, the Act became effective, and that as to causes accruing prior to August 28th, 1906, the claim might have been presented at any time prior to midnight on August 28th, 1907.[136]

(133) 13 I. C. C. Rep. 411. 416-417, (**627**), and see Cattle Raisers' Ass'n. v. Missouri, K. & T. R. Co., 13 I. C. C. Rep. 418, 435, (**399**-C).

(134) The last part of Par. 2, of Section 16, as amended, is as follows:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after: *Provided,* That claims accrued prior to the passage of this Act may be presented within one year."

(135) Goff-Kirby Co. v. Bessemer & L. E. R. Co., 13 I. C. C. Rep. 383, 386, (**623**).

Missouri & K. Sh. Ass'n. v. Atchison, T. & S. F. R. Co., 13 I. C. C. Rep. 411, (**627**).

See also Admin. Rul. No. 10, (Dec. 2d, 1907).

(136) Nicola Co. v. Louisville & N. R. Co., 14 I. C. C. Rep. 199, 206, (**685**).

There would seem to be some doubt as to the power of Congress to change the date of the "passage of the Act" merely by suspending its operation. It might well be said that when the President signed the Act, the date of its passage was unalterably fixed. See U. S. v. Standard Oil Co., 148 Fed. 719, 722, (**447**); and cf. Goff-Kirby Co. v. Bessemer & L. E. R. Co., 13 I. C. C. Rep. 383, 386, (**623**).

Where a claim for reparation was not promptly presented and actively prosecuted, the Commission has refused to award reparation, although the statutory period had not yet elapsed.[137] The Commission has said that it will not recognize the right of a carrier to waive the Limitation Provisions of the Act.[138]

326. Orders of the Commission.

Section 14 of the Act, as amended in 1906, requires the Commission to publish all orders issued in investigations made by it.

No order by the Commission is necessary to sanction a practice already legal.[139] Orders by the Commission must be specific and general orders in the terms of the Act are improper and will not be enforced by the Courts.[140]

In one case where damages had been suffered by the complainant for which the Commission had no power to compensate him, it issued an order stating that there had been undue discrimination on the part of the defendant.[141]

It is not contempt to disobey an order of the Commission.[142]

327. Form of Report.[143]

The Commission's report should not merely state the conclusions of the Commission but should give a sufficient summary of the evidence to enable the Court to understand how the conclu-

(137) Burgess v. Transcontinental Fr. Bur., 13 I. C. C. Rep. 668, 680, (659).

See also Tar. Circ., 15-A-Ruling No. 81, (June 7th, 1907), and Admin. Rul. No. 38, (Feb. 4th, 1908), as to time limit for reparation on informal complaints.

(138) Tar. Circ. 15-A, Ruling No. 81, (June 7, 1907).

(139) Re Export Tr. of Boston, 1 I. C. C. Rep. 24, 27, (7).

An order is not necessary to authorize a carrier to refund charges in excess of tariff rates. See supra §316.

(140) Farmers' Loan Co. v. Northern Pac. R. Co., 83 Fed. 249, 268, (1897).

Colorado Fuel Co. v. Southern Pac. Co., 101 Fed. 779, 785, (201-C).

(141) Heck & Petree v. E. Tenn., V. & G. R. Co., 1 I. C. C. Rep. 495, 502, (41).

(142) I. C. C. v. Brimson, 154 U. S. 447, 488-489; 14 Sup. Ct. 1125; 38 L. Ed. 104, (181).

(143) Section 14 of the Act provides as follows:

"That whenever an investigation shall be made by said Commission, it

sions were reached.[144] In cases involving an award of damages, the findings should be so arranged that they can be shown to a jury without including matters of opinion or argument.[145] The testimony taken before the Commission need not be annexed to its report or filed with the petition to enforce its order.[146]

328. Holding Cases Open.

The Commission does not conduct its proceedings according to the strict rules applied in Court.[147] Where a complainant fails to make out a case it may hold the case open to give him an opportunity for further proof.[148] It also holds a case open where an amicable settlement seems likely,[149] or to permit other defendants to be brought in.[150] Where the same question presented to the Commission was pending in a Federal Court, it has stayed pro-

shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."

(144) I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 414-415, (156-B). And see Cattle Raisers' Ass'n. v. Missouri, K. & T. R. Co., 13 I. C. C. Rep. 418, 421, (399-C).

(145) Western N. Y. & P. R. Co. v. Penn Ref. Co., 137 Fed. 343, 348-352, (155-E).
Southern R. Co. v. St. Louis, H. & G. R. Co., 153 Fed. 728, 733, (384-C).

(146) I. C. C. Rep. v. Cincinnati, N. O. & T. P. R. Co., 64 Fed. 981, 984, (183-C).

(147) See also supra, §§263, 303.

(148) Dewey v. Baltimore & O. R. Co., 11 I. C. C. Rep. 475, 480, (408).

(149) Nield v. Chicago, St. P. M. & O. R. Co., 12 I. C. C. Rep. 202, (1907).

(150) Bates v. Penna. R. Co., 3 I. C. C. Rep. 435, 449, (89-A).

ceedings to await the Court's decision.[151] The Commission has also set down for further hearing cases pending on June 29, 1906, the date of the Hepburn Amendment, with a view to making an order under the amended Section 15.[152]

329. Applications for Rehearing.[153]

(See Rule of Practice, No. XV, infra, Appendix).

Petitions for rehearing must be supported by affidavits which make out a *prima facie* showing that the Commission has committed a material error in fact or law, or that some material testimony has been overlooked or misapprehended.[154] A rehearing

(151) Southern Paint Co. v. Lake E. & W. R. Co., 6 I. C. C. Rep. 284, (1895).

But see Keith v. Kentucky C. R. Co., 1 I. C. C. Rep. 189, 198, (26).

(152) Cattle Raisers' Ass'n. v. Missouri, K. & T. R. Co., 12 I. C. C. Rep. 1, (399-B).

See also Cattle Raisers' Ass'n. v. Chicago, B. & Q. R. Co., 12 I. C. C. Rep. 6, (245-H).

(153) Section 16a of the Act as amended in 1906, is as follows:

"That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order."

(154) Riddle v. Pittsburg & L. E. R. Co., 1 I. C. C. Rep. 490, (1888).

Rice v. Western N. Y. & P. R. Co., 3 I. C. C. Rep. 87, (1889).

Myers v. Penna. Co., 3 I. C. C. Rep. 130, (1889).

Proctor & Gamble v. Cincinnati, H. & D. R. Co., 4 I. C. C. Rep. 443, (109).

Florida R. Com. v. Savannah, F. & W. R. Co., 5 I. C. C. Rep., 136, (137).

will not be granted where its obvious purpose is to delay the proceedings,[155] or to bring about a rediscussion of the facts and law already considered, or to induce the Commission to reach a different conclusion on these facts.[156] On a proper showing being made, rehearings have been granted [157] and findings modified by the Commission in certain cases;[158] in other cases rehearings have been refused.[159]

Although ordinarily a party to a proceeding is barred by a decision and order of the Commission from proceeding further in order to have the same cause of action passed on again, yet in case of a public complaint the Commission will sometimes consider a petition to modify its original order.[160]

(155) Independent Ref. Ass'n. v. Western N. Y. & P. R. Co., 5 I. C. C. Rep. 415, 426, (**155**-A).

(156) Myers v. Penna. Co., 3 I. C. C. Rep. 130, (1889).

(157) Independent Ref. Assn. v. Penna. R. Co., 6 I. C. C. Rep. 52, (**155**-B).
Re Allowances to Elevators, 13 I. C. C. Rep. 498, (**351**-B).

(158) Independent Ref. Ass'n. v. Penna. R. Co., 6 I. C. C. Rep. 449, (**155**-C).
See also Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 548, (**180**-C).

(159) Re Toledo Pr. Exchange's Petition, 2 I. C. C. Rep. 583, (1889).
Boston Fr. & Pr. Ex. v. New York & N. E. R. Co., 5 I. C. C. Rep. 1, (**128**-B).
Atchison City Council v. Missouri Pac. R. Co., 12 I. C. C. Rep. 254, (**477**).
Muskogee Com. Cl. v. Missouri, K. & T. R. Co., 13 I. C. C. Rep. 68, (**514**).
St. Louis Tr. Bur. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 105, (**562**).
Randolph Co. v. Seaboard A. L. R. Co., 14 I. C. C. Rep. 338, (**649**).
Ullman v. Adams Exp. Co., 14 I. C. C. Rep. 535, (**701**-B).

(160) Brockway v. Ulster & D. R. Co., 8 I. C. C. Rep. 21, (**255**).

CHAPTER XXVI.

CIVIL PROCEEDINGS IN THE COURTS.

330. In General
331. Enforcement of Orders of the Commission—Findings of Fact by Commission *Prima Facie* Evidence in Certain Cases.
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335. Same Subject--Practice where Ground for Enforcing the Commission's Order Appears which has not been Passed on by the Commission.
336. Issuance of Injunctions without Previous Investigation by the Commission.
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338. Injunctions to Restrain the Enforcement of the Orders of the Commission.
339. Mandamus Proceedings.
340. Damages before the Courts.
341. Orders Requiring Witnesses to Testify before the Commission.
342. Appeals from the Circuit Court.

330. In General.

The Act gives the Commission no power to enforce its orders. These are rendered effective in two ways: First, by reason of the heavy penalties imposed on carriers by the Amendment of 1906 for disobedience to the Commission's orders; and, second, by application under the 16th Section of the Act by the party injured, or by the Commission, to the Federal Courts for a writ requiring obedience thereto.[1]

Prior to the Amendment of 1906 the Act imposed no penalties on the carrier for failure to comply with the Commission's orders. If the carrier disputed the propriety of a given order it could raise the question in the Courts merely by refusing to comply therewith, thus forcing the Commission or the injured party

(1) See Par. 10 of Section 16, supra, p. 29.

The Act would not seem to provide for an appeal by a shipper against whom the Commission has decided a case before it.

Field v. Southern R. Co., 13 I. C. C. Rep. 298, 299, (613).

to apply for relief to the Court, where the whole controversy would be gone over again. Section 16, as amended by the Hepburn Act, however, prescribes a penalty of $5,000 for every day's knowing failure to comply with an order issued under Section 15.[2] Under the recent decision in Ex parte Young [3] there would perhaps seem to be some doubt as to the constitutionality of this provision. But if, as would appear, it is constitutional, its practical effect is to coerce the carrier into immediate obedience. The propriety or legality of the order can then be tested by a petition on the part of the carrier to enjoin, set aside, annul or suspend the order.[4]

In view of the above provision, many of the points decided by the Courts on petitions to enforce the Commission's orders are now perhaps of little practical value.

331. Enforcement of Orders of the Commission—Findings of Fact by Commission Prima Facie Evidence in Certain Cases.

Under the Act as it stood prior to 1906, on an application by the Commission to enforce its order, the findings of fact in its report were *prima facie* evidence of the matters stated therein; under the Amendment of 1906 this effect is given to the Commission's findings of fact only in case of petitions claiming damages previously awarded by the Commission. In one of the Federal cases decided shortly after the passage of the original Act, Judge Acheson intimated that unless the Act had specifically provided that the Commission's findings of fact should be *prima facie*

(2) Paragraphs 7 and 8 of Section 16 are as follows:

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section 15 of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

"The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs."

(3) 209 U. S. 123, (1908).

(4) See infra, §338.

evidence only, these findings might be held to be conclusive, in accordance with the principle that where the law has confided to a special tribunal the authority to hear and determine certain matters in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive on other tribunals.[5] This construction would now restrict the Court to a review of questions of law,[6] except in cases requiring a trial by jury.

Under the provision making the Commission's findings of fact *prima facie* evidence of the matters contained therein, it has been held that on petitions by the Commission to enforce its order, if the findings of fact make out a *prima facie* case, the burden of proof is on the defendant,[7] and that in such a proceeding no fact found by the Commission can be held to be unsupported by evidence.[8] The Supreme Court has said that it would "ascribe to such findings the strength due to the judgments of a tribunal appointed by law and informed by experience." [9]

In one case, however, arising prior to 1906, Judge Parnell, in the District Court in North Carolina, held that when the Commis-

(5) I. C. C. v. Lehigh Valley R. Co., 49 Fed. 177, 179, (1892).

(6) Such is the law under the English Act.

See I Boyle v. Waghorn, Chap. XXXIII, p. 309.

The Commission being an expert tribunal would seem more competent than a Court to pass on questions of fact connected with railroad rates.

In the recent decision in Missouri, K. & T. R. Co. v. I. C. C., 164 Fed. 645, (**399**-E), the court seemed to assume that the Amendment of 1906 had not altered the law as to the effect of the Commission's findings.

See, however, Stickney v. I. C. C., 164 Fed. 638, 643-644, (**399**-D).

(7) I. C. C. v. Louisville & N. R. Co., 118 Fed. 613, 622, (**275**-B).

(8) Southern Ry. Co. v. St. Louis, H. & G. Co., 153 Fed. 723, 734, (**384**-C).

(9) Illinois Cent. R. Co. v. I. C. C., 206 U. S. 441, 454; 51 L. Ed. 1128; 27 Sup. Ct. 700, (**369**-B).

Citing Louisville & N. R. Co. v. Behlmer, 175 U. S. 648; 44 L. Ed. 309; 20 Sup. Ct. 209, (**186**-D).

And East Tenn., V. & G. R. Co. v. I. C. C., 181 U. S. 1, 27; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D).

See also Tift v. Southern R. Co., 138 Fed. 753, 760, (**319**-B); 206 U. S. 428; 51 L. Ed. 1124; 27 Sup. Ct. 709, (**319**-C).

I. C. C. v. L. & N. R. Co., 102 Fed. 709, 710, (**242**-B), (decision reversed, but not on this point, 108 Fed. 988; 190 U. S. 273), (**242**-C-D).

Stickney v. I. C. C., 164 Fed. 638, (**399**-D).

Missouri, K. & T. R. Co. v. I. C. C., 164 Fed. 645, (**399**-E).

sion applied to a Court to enforce its order it must make out a case just as any other litigant.[10]

On demurrer to a petition by the Commission, the Court, where possible, will adopt such a construction of the findings as to make them support the order and will resolve every reasonable doubt in favor of the lawfulness of the latter.[11]

332. Same Subject—Questions of Reasonableness of Rates and Discriminations Questions of Fact.

Questions as to whether or not a rate is reasonable [12] or whether a given practice produces an unjust discrimination [13] are questions of fact.[14] In one case, however, the Court held that a finding that the practice of charging for the weight of oil barrels and not for the weight of oil tanks produced a discrimination in favor of tank shippers, was a finding of law and not one of fact.[15] This conclusion would seem open to doubt.

Whether or not competition is present and effective is a question of fact but whether, under the terms of the Act, it may properly be considered in adjusting rates, is one of law.[16]

(10) I. C. C. v. Cincinnati, P. & V. R. Co., 124 Fed. 624, 630, (**298**-B). See also I. C. C. v. Atchison, T. & S. F. R. Co., 50 Fed. 295, 304, (**110**-B).
I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144, 173-6; 42 L. Ed. 414; 18 Sup. Ct. 45, (**170**-D).

(11) I. C. C. v. Chicago, B. & Q. R. Co., 94 Fed. 272, 273, (**245**-B).
I. C. C. v. Southern Pac. R. Co., 123 Fed. 597, 603, (**302**-B), (decision reversed on another ground, 200 U. S. 536; 26 Sup. Ct. 330; 50 L. Ed. 585), (**302**-E).

(12) Western N. Y. & P. R. Co. v. Penn Ref. Co., 137 Fed. 343, 363, (**155**-E).

(13) I. C. C. v. Southern Pac. Co., 123 Fed. 597, 601, (**302**-B), (decision reversed on another ground, 200 U. S. 536; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302**-E).

(14) I. C. C. v. Alabama Mid. R. Co., 168 U. S. 144, 170; 18 Sup. Ct. 144; 42 L. Ed. 414, (**170**-D).
See quotation supra, §183.

(15) Western N. Y. & P. R. Co. v. Penn. Ref. Co., 137 Fed. 343-348; (**155**-E).

(16) I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 419, (**156**-B).

333. Same Subject—Preliminary Injunctions not Granted Where Facts of Complaint are Denied in the Answer.

A preliminary injunction will not be granted to enforce an order of the Commission, where the facts of the petition are denied in the answer.[17]

334. Same Subject—Courts not Bound by Reasoning of Commission but May not Modify the Commission's Orders.

On a petition by the Commission for a writ to enforce its order, the Court is not bound by the reasons or restricted to the grounds relied upon by the Commission. It may enforce the order, if for any reason it appears to be valid,[18] the proceeding being in a sense a new and original one.[19]

The Courts have no power to modify the Commission's order. They must enforce it as it stands or dismiss the petition,[20] and the Commission cannot help matters by filing with the Court a certificate stating that it did not intend its order to be as broad as on its face it appeared.[21] If, however, the order be separable, the

(17) I. C. C. v. Lehigh Val. R. Co., 49 Fed. 177, (1892).
Shinkle v. Louisville & N. R. Co., 62 Fed. 690, (**183**-B).
I. C. C. v. Cincinnati, N. O. & T. P. R. Co., 64 Fed. 981, (**183**-C).
As to injunctions to restrain enforcement of the Commission's orders see infra, §338.

(18) I. C. C. v. East Tenn., V. & G. R. Co., 85 Fed. 107, 110, (**162**-B), (decision reversed, 181 U. S. 1; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D), but not on this point).
I. C. C. v. Southern Pac. Co., 123 Fed. 597, 601, (**302**-B); 200 U. S. 536, 556-7; 26 Sup. Ct. 330; 50 L. Ed. 585, (**302**-E).
I. C. C. v. Alabama Md. R. Co., 168 U. S. 144, 175; 18 Sup. Ct. 45; 42 L. Ed. 414, (**170**-D).
See, however, Penn Ref. Co. v. Western N. Y. and P. R. Co., 208 U. S. 208, 222; 28 Sup. Ct. 268; 52 L. Ed. 493, (**155**-F).

(19) See Kentucky & Ind. Br. Co. v. Louisville & N. R. Co., 37 Fed. 567, 614, (**57**-B).

(20) I. C. C. v. Louisville & N. R. Co., 73 Fed. 409, 428, (**156**-B).
Detroit G. H. & M. R. Co. v. I. C. C., 74 Fed. 803, 841; 43 U. S. App. 308; 21 C. C. A. 103, (**100**-C).
Farmers' Loan Co. v. Northern Pac. R. Co., 83 Fed. 249, 253, 267, (1897).
I. C. C. v. Lake S. & M. S. R. Co., 134 Fed. 942, 947, (**309**-B); 202 U. S. 613; 26 Sup. Ct. 766; 50 L. Ed. 1171, (**309**-B).

(21) I. C. C. v. Delaware, L. & W. R. Co., 64 Fed. 723, (No. 1), (**180**-B).

Court may probably enforce the legal part and refuse to do so as regards the remainder.[22]

335. Same Subject—Practice Where Ground for Enforcing the Commission's Order Appears Which has not been Passed on by the Commission.

Although an order by the Commission is enforceable, irrespective of the grounds on which the Commission itself has rested it, if for any reason it appears to be a lawful one, yet where the Commission's decision has been based on a misconstruction of the Act, rendering the order invalid on the grounds stated by the Commission, the Court will not enforce it on a new ground not passed on by the Commission, even though the evidence might justify this, but will send the case back to the Commission to give that body an opportunity to pass on the new questions suggested.[23]

336. Issuance of Injunctions Without Previous Investigation by the Commission.

Prior to the passage of the Elkins Act in February, 1903, the only remedies existing for the protection of rights created under Section 3 of the Act were, first, a suit at law for damages, and second, application to the Commission followed by a suit in equity to enforce its order.[24] The latter contingency was the only one authorizing equitable interference, except in cases where mandatory injunctions were expressly authorized by the Amendment of 1889 (Section 23). The Court therefore had no authority to grant an injunction to restrain a violation of Section 3 at the suit of the United States brought by the Attorney General, although at the request of the Interstate Commerce Commission, the latter

(22) I. C. C. v. Western N. Y. & P. R. Co., 82 Fed. 192, 196, (**155**-D). See I. C. C. v. Lake S. & M. S. R. Co., 134 Fed. 942, 946-7, (**309**-B). I. C. C. v. Cincinnati, P. & V. R. Co., 124 Fed. 624. (**298**-B).

(23) Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197, 238-9; 16 Sup. Ct. 666; 40 L. Ed. 940, (**122**-D).

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 675-6; 20 Sup. Ct. 209; 44 L. Ed. 309, (**186**-D).

East Tenn., V. & G. R. Co. v. I. C. C., 181 U. S. 1, 27; 21 Sup. Ct. 516; 45 L. Ed. 719, (**162**-D).

Cf. I. C. C. v. Southern R. Co., 105 Fed. 703, 710-711, (**208**-B).

(24) Central Stock Yds. Co. v. Louisville & N. R. Co., 112 Fed. 823, (**300**-A); 192 U. S. 568; 24 Sup. Ct. 339; 48 L. Ed. 565, (**300**-B).

body having previously undertaken no formal investigation of the matter complained of.[25] Section 3 of the Elkins Act, however, although not legalizing injunctions issued prior to its passage,[26] applied to pending cases so as to give the Courts power to issue an injunction in such a case on a motion made after that Act became a law.[27]

Under Section 3 of the Elkins Act[28] a suit will lie on behalf of the Commission[29] or of the United States,[30] to enjoin violations of the Act, and the Attorney General may proceed either on request of the Commission or on his own motion.[31] The fact that the acts sought to be enjoined constitute a crime is no reason for denying relief.[32]

A Court has power, irrespective of the Act, to require a common carrier to perform its common law duty to receive and carry articles tendered to it.[33]

(25) Missouri Pac. R. Co. v. U. S., 189 U. S. 274; 23 Sup. Ct. 507; 47 L. Ed. 811, (187-B).

But see Interstate Stock Yds. Co. v. Indianapolis U. R. Co., 99 Fed. 472, 483, (276).

U. S. v. Michigan Cent. R. Co., 122 Fed. 544, (316).

Little R. & M. R. Co. v. East T., V. & G. R. Co., 47 Fed. 771, 774, (135).

Toledo, etc. Ry. Co. v. Penna. Co., 54 Fed. 730, 746; 19 L. R. A. 387, (1893); 166 U. S. 548; 17 Sup. Ct. 658; 41 L. Ed. 1110, (1897).

And cf. Danciger v. Wells Fargo Co., 154 Fed. 379, (1907).

(26) U. S. v. Atchison, T. & S. F. R. Co., 142 Fed. 176, (406).

(27) Missouri Pac. R. Co. v. U. S. 189 U. S. 274; 23 Sup. Ct. 507; 47 L. Ed. 811, (187-B).

U. S. v. Michigan Cent. R. Co., 122 Fed. 544, (316).

(28) See supra, p. 46, for the provisions in question.

(29) I. C. C. v. Chicago G. W. R. Co., 141 Fed. 1003, 1013-1014, (364-B).

(30) See U. S. v. Delaware & H. R. Co., 164 Fed. 215, (713).

(31) U. S. v. Milwaukee Ref. Co., 145 Fed. 1007, 1010, (411-B).

(32) Ibid.

(33) Danciger v. Wells Fargo Co., 154 Fed. 379, (1907).

A general omnibus injunction will not be issued in the terms of the Act; particular specified violations only will be enjoined.[34]

337. Enjoining Proposed Schedules.

The question of the power of the Courts under the present law to enjoin the filing of proposed schedules of rates or the enforcement of such when in effect, is fully discussed in Chapter XIX (*supra* §§ 242-243).

The authorities are not in harmony as to the district in which such suits may be brought. In two cases it has been held that, since jurisdiction does not depend on diverse citizenship, the bill must be filed in the district of which the defendant is an inhabitant;[35] other cases, however, have held that the provisions of the Judiciary Acts of 1887 and 1888, prohibiting suits except in the district of defendant's residence, do not apply to cases like that in question, where the Federal Courts have exclusive jurisdiction, and that such suits may be maintained in any district in which the defendants are found.[36]

338. Injunctions to Restrain the Enforcement of the Orders of the Commission.

In view of the enormous penalty imposed by the Act for disobeying orders of the Commission other than for the payment of money, it is probable that in future the question of the legality of the Commission's orders will be raised, not by petition of the shipper or of the Commission to enforce the order, but by a suit on the part of the carrier to set aside or suspend it under Par. 12 of Section 16, as amended by the Hepburn Act, the carrier having

(34) Colorado Fuel Co. v. Southern Pac. Co., 101 Fed. 779, 785, (**201**-C).
I. C. C. v. Chesapeake & O. R. Co., 200 U. S. 361, 404-405; 26 Sup. Ct. 272; 50 L. Ed. 515, (**339**-B).
See also supra, §326.

(35) Sunderland Bros. v. Chicago, R. I. & P. R. Co., 158 Fed. 877, (1908).
Memphis Cotton Oil Co. v. Illinois Cent. R. Co., 164 Fed. 290, (**715**).

(36) Northern Pac. R. Co. v. Pacific C. L. M. Asso., 165 Fed. 1, (**726**).
Union Pac. R. Co. v. Oregon & W. L. M. Asso., 165 Fed. 13, (**726**).
See also Macon Gr. Co. v. Atlantic C. L. R. Co., 163 Fed. 736, (**711**).

first obtained a temporary restraining order.[37] A number of actions have already been brought by the carriers and injunctions issued under this provision,[38] but no question of importance with reference to its construction has, as yet, been passed on in published cases.

339. Mandamus Proceedings.

Prior to the Hepburn Act, the only authority for the issuance of mandamus by a Federal Court was that conferred by the last paragraph of Section 6 (*supra,* p. 12n) to compel the filing of tariffs and by the Amendment of 1889 to compel the allowance of equal facilities to shippers.[39] The Courts had therefore no original jurisdiction by mandamus to compel a carrier to make an annual report required by the Commission under Section 20 of

(37) See supra, p. 30, for the text of this provision.

(38) See Delaware, L. & W. R. Co. v. I. C. C., 155 Fed. 512, (1907).
Stickney v. I. C. C., 164 Fed. 638, (399-D).
Missouri, K. & T. R. Co. v. I. C. C., 164 Fed. 645, (399-E).
Chicago & A. R. Co. v. I. C. C., 000 Fed. ——, (631-B).
Delaware, L. & W. R. Co. v. I. C. C., 000 Fed. ——, (688-B).
See also 22nd Ann. Rep. pp. 21-24, as to actions of this nature pending on Dec. 24th, 1908.

(39) The latter provision now constitutes Section 23 of the Act and is as follows:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact; *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act, or the act to which it is a supplement."

the Act.[40] The Hepburn Act, however, inserted in Section 20 a provision giving jurisdiction to the Circuit and District courts, on application by the Attorney General at the request of the Commission, to issue writs of mandamus commanding a carrier to comply with any of the provisions of the Act.[41]

The remedy by mandamus under Section 23 is not exclusive, but cumulative, and the institution of mandamus proceedings to compel proper car distribution does not prevent a concurrent petition under Section 13 to the Commission for the same purpose.[42]

In mandamus proceedings under the Act, the Court is not governed by the strict rules applicable where the writ is prerogative and not ordinary process. Amendments may therefore be allowed.[43]

The power of the courts to issue mandamus to compel a carrier to furnish a complaining mine owner with his proper quota of cars is not ousted by an agreement between the shippers in the region with reference to a basis of car distribution.[44]

(40) Knapp v. Lake Shore & M. S. R. Co., 197 U. S. 536; 25 Sup. Ct. 700; 49 L. Ed. 870, (376).

U. S. ex rel. v. Norfolk & W. R. Co., 138 Fed. 849, 852, (389-A).

But see U. S. ex rel. I. C. C. v. Chicago, K. & S. R. Co., 81 Fed. 783, (227).

I. C. C. v. Bellaire, Z. & C. R. Co., 77 Fed. 942, (213).

U. S. ex rel. I. C. C. v. Seaboard Ry. Co., 82 Fed. 563, 566, (233-A); 85 Fed. 955, (233-B).

Also Augusta S. R. Co. v. Wrightsville & T. R. Co., 74 Fed. 522, (205).

(41) This provision, which constitutes the 9th paragraph of Section 20, is as follows:

"That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them."

See U. S. v. Delaware & H. R. Co., 164 Fed. 215, (713).

(42) Merchants' Coal Co. v. Fairmont Coal Co., 160 Fed. 769, (581).

(43) West Va. Nor. R. Co. v. U. S. ex rel. Kingwood Coal Co., 134 Fed. 198, 203; 67 C. C. A. 220, (320-B).

(44) U. S. ex rel. Greenbrier Co. v. Norfolk & W. R. Co., 143 Fed. 266; 74 C. C. A. 404, (389-B).

As to discriminations in car distribution see supra, Chap. XV.

The president of a railroad who is also its principal stockholder and the owner of a Coal Company alleged to be receiving an undue preference in car distribution, is a proper party to mandamus proceedings to require proper distribution.[45]

340. Damages Before the Courts.

There is no appeal, as such, to the Federal Courts from an order of the Commission denying or awarding damages;[46] and the Court has no power to award such on application by the Commission to enforce its order.[47] The only procedure to recover damages after the Commission's decision, is that specified in Section 16 of the Act.[48]

Cf. also U. S. ex rel. Morris v. Delaware, L. & W. R. Co., 40 Fed. 101, (**87**).

Augusta S. R. Co. v. Wrightsville & T. R. Co., 74 Fed. 522, (**205**).

(45) West V. Nor. R. Co. v. U. S., ex rel., 134 Fed. 198, 203; 67 C. C. A. 220, (**320**-B).

(46) Western N. Y. & P. R. Co. v. Penn Ref. Co., 137 Fed. 343, 354, (**155**-E).

(47) I. C. C. v. Western N. Y. & P. R. Co., 82 Fed. 192, 195, (**155**-D); reversed 137 Fed. 343, (**155**-E); 208 U. S. 208; 28 Sup. Ct. 268; 52 L. Ed. 493, (**155**-F); but not on this point.

(48) This provision constitutes the first three paragraphs of Section 16, and is as follows:

"That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall

In case a carrier has charged the rates duly published and filed, and a shipper alleges that such rates are unreasonable, the only way in which he can obtain redress is by application to the Commission.[49]

Where no rate is filed, or where the rate charged is in excess of the published rate, or in other instances in which the Commission has not exclusive jurisdiction, a shipper has the choice of two remedies. He may either make complaint to the Commission, or may bring suit in the Federal Courts, but must elect between the two remedies.[50] A suit in a State court in such a case is not, however, a bar to a subsequent complaint to the Commission;[51]

be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

"In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating offices. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff."

(49) See supra, §§240-243, 244, 280, 309.

(50) Section 9 of the Act provides in part as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . . ."

(51) Gallogly v. Cincinnati H. & D. R. Co., 11 I. C. C. Rep. 1, 9, (381).

and where the rate charged was in accordance with the tariff filed, a suit in a Federal Court is not a bar, since that Court had no jurisdiction to entertain the suit.[52]

The Commission and the Federal Courts have exclusive jurisdiction to award damages under the Act,[53] and a Federal Court cannot therefore take jurisdiction, on removal from a State court, of an action by a shipper to recover excessive charges.[54] Where, however, the carrier brings suit for freight in a State court and the defendant removes the case on account of diverse citizenship, the Federal Court has jurisdiction, even though the defense is based on the Interstate Commerce Act.[55]

Under the original Act, actions for damages might be brought in the district of defendant's residence or in any district where it was doing business and was properly served.[56] The Hepburn Amendment permits any person for whose benefit an order for the payment of money was made to file his petition in the Circuit Court for the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs.[57] Actions by joint plaintiffs against joint defendants may be maintained in any district where any one of the

(52) Baer Bros. Co. v. Missouri Pac. R. Co., 13 I. C. C. Rep. 329, 340, (617).

(53) Van Patten v. Chicago, M. & St. P. R. Co., 74 Fed. 981, (209).
Edmunds v. Illinois Cent. R. Co., 80 Fed. 78, 79, (1897).
Northern Pac. R. Co. v. Pacific C. L. M. Asso., 165 Fed. 1, 10, (726).
Copp v. Louisville & N. R. Co., 43 La. Ann. 511; 9 So. 441; 3 Int. Com. Rep. 625, (1891).
Fitzgerald v. Fitzgerald Co., 41 Neb. 374, 499; 59 N. W. 838, (1894).
Carlisle v. Missouri Pac. R. Co., 168 Mo. 652; 68 S. W. 898, (1902).
Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302; 83 S. W. 362, (1904).
Wabash R. Co. v. Sloop, 200 Mo. 198; 98 S. W. 607, (1906).
See, however, Murray v. Chicago & N. W. R. Co., 62 Fed. 24, 43, (1894); (92 Fed. 868; 35 C. C. A. 62).
Banner v. Wabash R. Co., 131 Ia. 405; 108 N. W. 759, (1906).
Halliday Co. v. Louisville & N. R. Co., 80 Ark. 536; 98 S. W. 374, (1906).
St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463; 56 N. W. 957, (1893).
See also supra, §§240 and 244, notes 73 and 85-90.

(54) Swift v. Phila. & R. R. Co., 58 Fed. 858, (174-A).
Sheldon v. Wabash R. Co., 105 Fed. 785, (1900).

(55) Lehigh Valley R. Co. v. Rainey, 99 Fed. 596, (278).

(56) Van Patten v. Chicago, M. & St. P. R. Co., 74 Fed. 981, (209).

(57) Section 16, Par. 2.

joint plaintiffs could maintain such suit against any one of the joint defendants, service of such defendants as are not found in the district to be made in such cases in any district where such defendant has its principal operating office.[58]

As to Limitation of Actions for damages under the Act, see *supra* §325.

341. Orders Requiring Witnesses to Testify Before the Commission.

Section 12, Par. 3[59] of the Act gives to the Circuit Courts power to issue orders requiring witnesses to testify before the Commission.[60] The issuance of the order in such a case does not impose on the Court a duty not judicial in its nature, and thus render this provision of the Act unconstitutional.[61]

342. Appeals from the Circuit Court.

Between the creation of the Circuit Court of Appeals and the passage of the Expediting Act of February 11th, 1903,[62] no appeal lay directly to the Supreme Court from the Circuit Court, the appeal being first to the Circuit Court of Appeals and from there to the Supreme Court.[63]

(58) Section 16, Par. 3.

(59) This provision is as follows:

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. . . . ."

(60) See I. C. C. v. Reichmann, 145 Fed. 235, (421).
I. C. C. v. Harriman, 157 Fed. 432, (580-A).
Harriman v. I. C. C., 211 U. S. 407, (580-B).
I. C. C. v. Baird, 194 U. S. 25; 24 Sup. Ct. 563; 48 L. Ed. 860, (318-B).

(61) I. C. C. v. Brimson, 154 U. S. 447; 14 Sup. Ct. 1125; 38 L. Ed. 104, (159-B).
See also Cassatt v. Mitchell Coal Co. 150 Fed. 32, (1907).

(62) See supra, p. 48, for text of this provision.

(63) I. C. C. v. Atchison, T. & S. F. R. Co., 149 U. S. 264; 13 Sup. Ct. 837; 37 L. Ed. 727, (1893).
Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co., 159 U. S. 698; 16 Sup. Ct., 189; 40 L. Ed. 311, (1895).

The proviso in Section 3 of the Elkins Act, as applied to Section 2 of the Expediting Act, governs petitions by the Commission for orders requiring witnesses to give testimony.[64]

The provision in Section 16[65] that appeals shall not operate to supersede the order of the Court, relates solely to the effect of the appeal and does not deprive the Circuit Court of control over its own decree.[66] This Court still has discretion, under Equity Rule 93, to allow a supersedeas, but will not do so unless justice requires it.[67]

Where, prior to the Act of February 11, 1903, an appeal was taken from an order of the Circuit Court of Appeals reversing that of the Circuit Court, the appeal operated as a supersedeas of the decree of the Circuit Court of Appeals, leaving that of the Circuit Court to stand.[68]

The Supreme Court will regard as binding on it, decisions by the Commission which have been impliedly sanctioned by Congress by re-enactment of the provision in question without change.[69] Where it appears that the carrier has conceded the relief asked for by the Commission while its appeal was pending in the Circuit Court of Appeals and prior to that Court's decree, but that the Circuit Court of Appeals was not asked to order the continuance of the rates so altered, the Supreme Court will not modify the latter's decree in this respect.[70]

(64) I. C. C. v. Baird, 194 U. S. 25. 39; 24 Sup. Ct. 563; 48 L. Ed. 860, (318-B).

(65) Section 16, Par. 11, is as follows:

"From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from."

(66) I. C. C. v. Louisville & N. R. Co., 101 Fed. 146, (1899).

(67) I. C. C. v. Southern Pac. Co., 137 Fed. 606, 608, (302-D).

(68) Louisville & N. R. Co. v. Behlmer, 169 U. S. 644; 18 Sup. Ct. 502; 42 L. Ed. 889, (1898).

(69) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361, 401; 26 Sup. Ct. 272; 50 L. Ed. 515, (339-B).

(70) I. C. C. v. Louisville & N. R. Co., 190 U. S. 273, 286; 23 Sup. Ct. 687; 47 L. Ed. 1047, (242-C).

CHAPTER XXVII.

PENAL AND CRIMINAL PROCEEDINGS.

343. Construction of the Penal Provisions of the Act.
344. Analysis of Penal and Criminal Provisions of the Act.
345. Departure from Tariff Rates.
346. Same Subject — In What District Prosecuted.
347. Same Subject—Number of Offenses.
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354. Conspiracies to Violate the Act.
355. May Offenses under the Act be Prosecuted by Information?
356. Necessary Allegations in Indictments for Various Offenses.
357. Hepburn Act not Retroactive but Repealing Clause did not Operate to Pardon Unindicted Offenses Committed Prior to its Passage.
358. Effect of Joint Resolution of June 30th, 1906.
359. Limitation of Actions.

343. Construction of the Penal Provisions of the Act. [1]

The Act to Regulate Commerce is to a certain extent a remedial one and therefore entitled to such a construction as will accomplish the main purposes of its enactment.[2] On the other hand, it is a well established rule of law that penal statutes are to be strictly construed. In spite of the latter principle, the tendency of the Courts, especially during the last few years, has been, even in criminal cases, to disregard technicalities, and to give the

(1) In the present Chapter it is not, of course, attempted to discuss at length every offense made criminal by the Act, for Section 10 makes all violations of the Act misdemeanors. Only such questions as peculiarly concern the criminal or penal features of the Act are here dealt with.

(2) New York, N. H. & H. R. Co. v. I. C. C., 200 U. S. 361, 391; 50 L. Ed. 515; 26 Sup. Ct. 272, (339-B).

Act a common sense interpretation, calculated to effectuate its purpose. In a recent case, Judge Hundley said:

"While it is true that, before a case can be held to fall within a penal statute, the case must come within the letter and spirit of the statute, yet if it comes within the spirit, and also within one reasonable interpretation of the letter, of the statute, it is sufficient, although there may be a literal construction that might be put upon the statute which would not include the case." [3]

344. Analysis of Penal and Criminal Provisions of the Act.

(See supra, p. 1, et seq. for full text of the Act and changes made by amendments).

The various offenses created by the Act, together with the penalty prescribed for each, may be tabulated as follows:

	OFFENSE.		PENALTY.
(a)	The wilful doing, causing to be done, or permitting anything in the Act prohibited or declared unlawful, or the omission of anything in the Act required, or the aiding or abetting of the same by a carrier subject to the Act, its agents, etc.[4]	(a)	Misdemeanor—punishable by fine not to exceed $5000 for each offense. In case the offense is discrimination,—imprisonment in the penitentiary not exceeding two years, or both fine and imprisonment.

(3) U. S. v. Williams, 159 Fed. 310, 313, (**601**).

See also Armour v. U. S., 209 U. S. 56, 72; 52 L. Ed. 428; 28 Sup. Ct. 428, (**476**-B).

Camden Iron Works v. U. S., 158 Fed. 561, 564-5, (**449**-B).

Re Express Cos., 1 I. C. C. Rep. 349, 362, (1887).

(4) Section 10, Par. 1.

This provision is in full as follows:

"That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act, or shall aid or abet therein, shall

OFFENSE.	PENALTY.
(b) The wilful failure by a carrier to file and publish tariffs, etc., as required by the Act, or strictly to observe the same until changed by law.[5]	Misdemeanor—subject to fine of from $1000 to $20,000.
(c) Knowingly to offer, grant, give, solicit, accept, or receive any concession or discrimination whereby property is transported at less than tariff rates, or whereby any other advantage is given or discrimination practiced.[5]	Misdemeanor—subject to fine of from $1000 to $20,000, or imprisonment not exceeding two years, or both.

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be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The Elkins Act makes the carrier corporation itself responsible as well as its agents.

(5) Elkins Act, as amended, Par. 1.

This provision is as follows:

"The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or

OFFENSE.	PENALTY.
(d) The knowing receipt by a shipper or its agents of a rebate against tariff charges.[6]	Shipper forfeits three times the amount thereof to the United States, in addition to penalties, etc., in (c).
(e) To give or receive a free pass, except as permitted under Sec. 1 or Sec. 22.[7]	Offender forfeits from $100 to $2000 to the United States.[8]
(f) The wilful and knowing assistance or permission by a carrier, its agents, etc., of any person, in obtaining transportation at less than established rates, by means of false billing or other similar device.[9]	Misdemeanor—subject to fine not exceeding $5000, or imprisonment in the penitentiary for two years, or both.
(g) The knowing and wilful obtaining of transportation at less than established rates by any person or agent of a corporation by	Fraud—Misdemeanor—Subject to fine not exceeding $5000, or imprisonment for two years, or both.

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corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the Court."

(6) Elkins Act, as amended. Section 1, Par. 3.
See supra, p. 45, for full text of this provision.

(7) Section 1, Par. 4.
For the full text of this provision see supra, p. 4.

(8) As to whether this penalty is exclusive, see intra §352.

(9) Section 10, Par. 2.
In full, this provision is as follows:
"Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof,

OFFENSE.	PENALTY.
means of false billing or other similar device,[10]	
(h) For any person, or any officer of a corporation to solicit, or induce a carrier or its agents to discriminate in his or its favor against another shipper, or to aid or abet in the same.[11]	Misdemeanor—Subject to fine not exceeding $5000, or imprisonment not exceeding two years, or both.
(i) The knowing failure or neglect by a carrier, its of-	Forfeiture of $5000 to the United States for each offense.

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or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense."

(10) Section 10, Par. 3.

In full, this provision is as follows:

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

(11) Section 10, Par. 4.

This provision, in full, is as follows:

"If any such person, or any officer or agent of any such corporation

	OFFENSE.	PENALTY.
	ficers, etc., to obey any order of the Commission made under Section 15.[12]	
(j)	The failure by a carrier, person, or corporation subject to the Act to make and file annual or monthly reports, or answer authorized questions to the Commission within the proper time.[13]	Forfeiture of $100 for each day's continued violation.
(k)	The failure or refusal of carriers, receivers, or	Forfeiture of $500 for each offense.

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or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

The Elkins Act makes the carrier corporation criminally responsible for its agents' violations of the Act.

(12) Section 16, Par. 7.

In full, this paragraph reads as follows:

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of Section 15 of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense."

(13) Section 20, Pars. 2 and 3.

Paragraph 2 in part, and paragraph 3 in full, are as follows:

" . . . . if any carrier, person, or corporation subject to the

OFFENSE.	PENALTY.
trustees to keep accounts, etc., as prescribed by the Commission, or submit same to Commission.[14]	
(l) The making of false entries in accounts, etc., or wilful destruction or mutilation of records, or neglect to make full, true, and correct entries, or keeping other records than those prescribed by the Commission.[15]	Misdemeanor—Subject to fine of from $1000 to $5000, or imprisonment for from one to three years, or both.
(m) The divulgence by an examiner of facts coming to his knowledge during a	Fine not to exceed $5000, or imprisonment not to exceed two years, or both.

provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

"Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act."

(14) Section 20, Par. 6.

In full, this paragraph reads as follows:

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense, and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act."

(15) Section 20, Par. 7.

This paragraph, in full, reads as follows:

"Any person who shall wilfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a

OFFENSE.	PENALTY.
course of examination prescribed by the Commission.[16]	Fine of from $100 to $5000, or imprisonment not to exceed one year, or both.
(n) The refusal or neglect to attend and testify, answer questions or to produce books, etc., before the Commission.[17]	

345. Departure from Tariff Rates.

Of the foregoing provisions, those which have been subjected to the principal discussion by the courts are the provisions prescribing a fine or imprisonment for departure by carriers or shippers from tariff rates. The sweeping provision of Section 10, making criminal all things declared by the Act unlawful, as applied to the requirements of Section 6, covers, in part, the same

carrier, or who shall wilfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall wilfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment."

(16) Section 20, Par. 8.

In full, this provision is as follows:

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both."

(17) Testimony Act of Feb. 11th, 1893, Par. 2.

In full, this provision reads as follows:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent juris-

subject matter as the first paragraph of the Elkins Act; but whereas Section 10 and Section 6 apply merely to the carrier and its agents, the Elkins Act makes the shipper as well as the carrier responsible for discriminations or departure from tariff rates.[18]

The penal and criminal provisions quoted above [19] from paragraph 1 of the amended Elkins Act may be divided into three definite offenses: (A) The failure by the carrier to file and publish its tariffs and strictly to observe the same; (B) The giving or receiving of concessions or discriminations whereby property is transported at less than tariff rates; (C) The giving or receiving of concessions or discriminations whereby *any other* advantage is given or discrimination practiced. The word "knowingly," introduced by the Hepburn Act, does not apply to the first of these provisions, but does apply to the second and third.

Although the second of the three foregoing offenses is probably not complete until the final settlement between carrier and shipper at the unlawful rate,[20] its essence is transportation.[21] In case of the third offense,—"giving or receiving concessions whereby *any other* advantage is given or discrimination practiced,"—it would seem that no transportation is essential.[22] In

diction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment."

(18) The Elkins Act also makes the railroad corporation criminally responsible as well as its officers.

(19) (b) and (c) supra §344.

(20) U. S. v. Hanley, 71 Fed. 672, 675, (**202**).
U. S. v. Great Nor. R. Co., 157 Fed. 288, (**490**).
Standard Oil Co. v. U. S., 164 Fed. 376, (**530**-B).
But see U. S. v. Vacuum Oil Co., 158 Fed. 536, 538. (**572**).

(21) Armour & Co. v. U. S., 209 U. S. 56, 74;; 52 L. Ed. 428; 28 Sup. Ct.. 428, (**476**-B); (153 Fed. 1, 4-9; 82 C. C. A. 135), (**476**-A).
Cf. Griffee v. Burlington, etc. R. Co., 2 I. C. C. Rep. 301, (**60**).
Re Huntingdon, 68 Fed. 881, (1895).
In Chicago, St. P., M. & O. R. Co. v. U. S., 162 Fed. 835, 838, (**450**-B). Judge Adams said:
"The substantial elements of the offense are few. There must be (1) the granting or giving of a rebate, (2) from the published and filed rates, (3) for the transportation of property, (4) by a carrier engaged in interstate commerce."

(22) Armour & Co. v. U. S., 153 Fed. 1, 9; 82 C. C. A. 135 (**476**-A); 209 U. S. 56, 74; 52 L. Ed. 428; 28 Sup. Ct. 428, (**476**-B).

the latter case it would appear necessary, however, to show that some favored shipper gained a definite advantage by means of the facts relied on as constituting the offense.

346. Same Subject—In What District Prosecuted?

In case of the receipt of a concession from a through rate the shipper may be prosecuted in any district through which the transportation may have been conducted, even though the actual payment of the rebate was made on a part of the rate applicable to still another district.[23] Cases under this provision are distinguishable from those under Section 10, Par. 3, where the gist of the offense is not the transportation itself but the fraudulent obtaining of the transportation; the latter offense may be prosecuted only in the district where the transportation was obtained.[24]

347. Same Subject—Number of Offenses.

All the provisions discussed in §345 refer, in a sense, to the same subject matter, and clearly on a given state of facts neither a carrier nor a shipper could be punished for more than one of the offenses specified. The offering and giving of a rebate are not two separate crimes, but are separate stages of the same offense, and an indictment charging both in one count is not bad for duplicity.[25] The same is true of accepting and receiving a rebate.[26] To give or obtain a concession whereby property is transported on a through bill at less than published rates is not a series of offenses, although continuously committed in each district through which the traffic moves, but is a single continuing offense extending over the whole journey.[27]

(23) Armour & Co. v. U. S., 209 U. S. 56; 52 L. Ed. 428; 28 Sup. Ct. 428, (476-B).
See also U. S. v. Fowkes, 49 Fed. 50; (1892), 53 Fed. 13, (1892).

(24) Re Belknap, 96 Fed. 614, (282).
Davis v. U. S., 104 Fed. 136, (282).
Armour & Co. v. U. S., 153 Fed. 1, 6-7; 82 C. C. A. 135, (476-A); 209 U. S. 56, 74; 52 L. Ed. 428; 28 Sup. Ct. 428, (476-B).
See also infra, §352.

(25) U. S. v. Del., L, & W. R. Co., 152 Fed. 269, 273-274, (452).
U. S. v. Great Nor. Co., 157 Fed. 288, 290, (490).

(26) Thomas v. United States, 156 Fed. 897, 908, (538).

(27) Armour v. U. S., 209 U. S. 56, 77; 52 L. Ed. 428; 28 Sup. Ct. 428, (476-B).

The cases are not uniform as to how many offenses are committed in a case where, for instance, a trainload is shipped at a lower rate per ton than the tariff prescribes, settlement for the concession being made in two separate payments. In one case it has been clearly held that each carload constitutes a separate offense,[28] and in another case this rule would also seem to have been adopted.[29] The first of these decisions has been reversed, however, by the Circuit Court of Appeals, holding that there can be only as many offenses as there were settlements.[30]

In another case it has been decided that each payment is a separate offense, although all were in pursuance of the same agreement;[31] and in still another it was held that although there might be a separate count for each shipment made, there could only be as many penalties as there had been payments.[32] Under the latter rule the number of shipments and the number of payments would each appear to be a maximum limit to the number of penalties which could be imposed.

This question must be settled by the Supreme Court. The better rule would seem to be that of the Circuit Court of Appeals in the Standard Oil case.

348. Same Subject—Necessity of Intent or Guilty Knowledge.

The provisions of Section 6, taken in connection with Section 10, and the first offense specified in paragraph 1 of the Elkins Act,[33] are directed solely at the carriers, and make the wilful failure of the carrier to file, publish, and adhere to tariff rates a misdemeanor. These provisions do not contain the word "knowingly," which was introduced into the Elkins Act by the Hep-

(28) U. S. v. Standard Oil Co., 155 Fed. 305, (530-A).

(29) U. S. v. Vacuum Oil Co., 158 Fed. 536, 538-9, (572).

(30) Standard Oil Co. v. U. S., 164 Fed. 376, (530-B).

(31) U. S. v. Great Nor. R. Co., 157 Fed. 288, (490).

(32) U. S. v. Central Vt. R. Co., 157 Fed. 291, (564).
See also U. S. v. Southern Pac. R. Co., 157 Fed. 459, 463, (1907), and U. S. v. Baltimore & O. R. Co., 159 Fed. 33, (1908), holding that in cases under the 28-hour law each shipment constitutes a separate offense.

(33) Failure to adhere to tariff rates.

burn Amendment, and which applies to the giving by carriers or the acceptance by shippers of discriminations or of transportation at less than tariff rates. Under a case arising prior to the taking effect of the Hepburn Amendment, it has recently been held by the Circuit Court of Appeals for the Seventh Circuit, that a shipper could not be convicted under this provision without proof that he knew the published rate from which he was accused of accepting a concession. It was intimated in this case that the decision did not apply to the carriers, who were presumed to know what the rate was which they had filed. In the case of the shipper, however, it was held that the fact that the tariff rates are open to inspection did not put him on notice of the actual rate, and that he might, to a certain extent, rely on what the agents of the carriers told him.[34] In cases arising since the introduction of the word "knowingly," this would seem to be entirely clear, but under the Act as it stood prior to 1906, a different conclusion might well have been reached.[35]

No evil purpose, guilty intent, or moral turpitude, however, is necessary to constitute the offense under discussion, either on the part of the carrier or of the shipper.[36] It is *malum prohibitum* and no specific intent is necessary beyond the purpose to do the act forbidden by law.[37] Even in the case of a shipper, all that is required to convict is proof that he knew what the lawful rate was, and accepted transportation for a less amount. Nor is it necessary that the concession in question be achieved by any device or underhand method.[38]

(34) Standard Oil Co. v. U. S., 164 Fed. 376, (**530**-B).

(35) See supra §244 et seq.

(36) U. S. v. New York Cent. R. Co., 146 Fed. 298, 300, (**429**).
Armour & Co. v. U. S., 153 Fed. 1, 22-24; 82 C. C. A. 135, (**476**-A); 209 U. S. 56, 85; 52 L. Ed. 428; 28 Sup. Ct. 428, (**476**-B).
But see U. S. v. Michigan Cent. R. Co., 43 Fed. 26, 30, (**108**).
Davies v. Pere Marquette R. Co., 10 I. C. C. Rep. 405, (**361**).

(37) U. S. v. Hanley, 71 Fed. 672, 676, (**202**).
Armour v. U. S., 153 Fed. 1, 22-24; 82 C. C. A. 135, (**476**-A).
Chicago, St. P., M. & O. R. Co. v. U. S., 162 Fed. 835, 842-843, (**450**-B).

(38) Armour v. U. S., 153 Fed. 1, 15-17; 82 C. C. A. 135, (**476**-A); 209 U. S. 56, 69-72; 52 L. Ed. 428; 28 Sup. Ct. 428, (**476**-B).
Chicago, St. P., M. & O. R. Co. v. U. S., 162 Fed. 835, 838, (**450**-B).

349. Same Subject—Parties Guilty Under the Act.

(See also supra, §44 and infra, §§301 and 324).

Prior to the Elkins Act the railroad corporation itself was not criminally liable,[39] this being restricted to its officers and agents, but that Act has made the corporation responsible. The officers of the carrier company and the heads of departments are the parties at whom the prohibition against giving rebates was primarily aimed. Although subordinate officials may be found guilty under the Act, the Courts will require clear proof to convict one not in a position of responsibility.[40]

A receiver appointed after a given schedule of rates has been filed, who does not ratify such schedule subsequent to his appointment, cannot be held guilty of departing therefrom, since he is not a party to the tariff.[41] A corporation not a party to the record, which owns the entire capital stock of a company indicted for receiving rebates, cannot be convicted of an offense committed by the latter.[42] A carrier and its agent may properly be joined in one indictment, and the shipper may also be joined.[43] A car-company giving premiums to shippers who use its cars may be prevented from so doing under the provision prohibiting the giving of concessions, the power of Congress and the provisions of the Act not being limited to the common carriers subject

(39) U. S. v. Michigan Cent. R. Co., 43 Fed. 26, 28, (**108**).
Re Peasley, 44 Fed. 271, 275, (1890).

(40) U. S. v. Michigan Cent. R. Co., 43 Fed. 26, 30, (**108**).
See also U. S. v. Fowkes, 49 Fed. 50; 53 Fed. 13, (1892).
U. S. v. Mellen, 53 Fed. 229, (**158**).

(41) U. S. v. DeCoursey, 82 Fed. 302, (**234**).
See also supra §44.

(42) Standard Oil Co. v. U. S., 164 Fed. 376, (**530-B**); reversing 155 Fed. 305, (**530-A**).
See also U. S. v. Atchison, T & S. F. R. Co., 142 Fed. 176, 191-3, (**406**).
U. S. v. Milwaukee Tr. Co., 142 Fed. 247, (**411-A**); 145 Fed. 1007, (**411-B**).
U. S. v. Wood, 145 Fed. 405, 414, (**423**).
And cf. Brady v. Penn. R. Co., 2 I. C. C. Rep. 131, (**53**).

(43) U. S. v. New York Cent. R. Co,, 146 Fed. 298, (**429**).
U. S. v. Chicago & A. R. Co., 148 Fed. 646, (**430-A**).

thereto.[44] An employe who secures a pass and gives it to a party not entitled to travel thereon, is guilty as accessory to the offense of obtaining free transportation.[45] A consignee may be liable for receiving rebates as well as his consignor.[46]

350. Same Subject—Judgment for Giving Rebates Extinguished by Death of Defendant.

A judgment in a prosecution for giving rebates is extinguished on the death of the party convicted and is not enforceable against his estate.[47]

351. Same Subject—Effect of Participation in Rates by Carriers not Parties to Tariffs in Question.

Paragraph 2 of the Elkins Act is as follows:

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

In a case involving a through shipment over the lines of several connecting carriers, one of which has not filed its concurrence in the rate, it has been held that the participation by such carrier in the rate filed by the others made such rate the legal one as against it in a prosecution under the first clause of

(44) I. C. C. v. Reichmann, 145 Fed. 235, (1906).
See also U. S. v. Milwaukee Ref. Tr. Co., 145 Fed. 1007, 1012, (**411-B**).

(45) U. S. v. Williams, 159 Fed. 310, (**601**).

(46) U. S. v. Standard Oil Co., 148 Fed. 719, (**447**).

(47) U. S. v. Pomeroy, 152 Fed. 279, (1907).

Section 1 of the Elkins Act, requiring the observance of tariff rates, but not under the second clause, prohibiting the departure from rates filed; in the latter case an actual filing or express concurrence was held to be essential.[48]

Participation by a carrier in rates filed by a connecting line is conclusive against the participating carrier only, and not against shippers, whose only means of determining the legal rate is by means of the tariff filed or expressly concurred in by the carriers. A shipper is not therefore liable for accepting a rebate where the rate from which he was alleged to have received a concession was not filed or expressly concurred in by the carrier paying him the alleged rebate, although the latter received and transported traffic at the rate filed by the connecting lines.[49]

352. Discrimination and Free Passes.

Section 10 of the Act makes it a misdemeanor to charge unreasonable rates, or to allow discriminations between shippers or preferences among localities. It is not here attempted to define what are unreasonable rates, or what constitutes an unjust discrimination or an undue preference. These questions are dealt with in other parts of the book.

The Hepburn amendment introduced into Section 1 of the Act a provision prohibiting the issuance of free passes except to certain specified persons.[50] For violation of this requirement, a penalty is imposed of not less than $100 nor more than $2,000. Al-

(48) U. S. v. New York Cent. & H. R. R. Co., 157 Fed. 293, (571). See also Chicago, B. & Q. R. Co. v. U. S., 157 Fed. 830, (542), where the facts are not very clear.

Compare Form and Contents of Rate Schedules, 6 I. C. C. Rep. 267, 272, (1894).

(49) Camden Iron Works v. U. S., 158 Fed. 561, 563-4 (449-B), reversing U. S. v. Camden Iron Works, 150 Fed. 214, 218, (449-A); see also U. S. v. Wood, 145 Fed. 405, 409-10, (423).

In Armour v. U. S., 153 Fed. 1; 82 C. C. A. 135, (476-A); 209 U. S. 56; 52 L. Ed. 428; 28 Sup. Ct. 428, (476-B), the shippers were convicted on the same facts as appeared in C. B. & Q. R. Co. v. U. S., 157 Fed. 830, (542), and where it does not clearly appear that the defendant filed or concurred in the rate alleged to have been departed from, (see 157 Fed. 832-4).

(50) For full text of this provision, see Par. 4 of Sec. 1 of the Act, supra, p. 3.

though the issuance of a free pass amounts to a discrimination between individuals forbidden by Sections 2 and 3 and made a misdemeanor by Section 10, yet it would seem that the penalty and imprisonment provisions of Section 10 do not apply to the issuance of free passes, and that officers of a carrier could not be subject to imprisonment nor to a greater fine than $2,000 for improperly giving passes. The specific penalty prescribed by the Hepburn Amendment for the giving of free passes, being inconsistent with that imposed under Section 10 or under the Elkins Act, would seem to be exclusive.[51]

353. False Billing, Classification, Weighing, etc.

To constitute the offense of false billing, etc., forbidden by Section 10, Par. 3, there must be: first, a wilfully false billing, classification or misrepresentation of the character of the property to be shipped; second, the obtaining by that means of a lower rate of transportation than the regular rate; and third, either the delivery of the property to the common carrier for transportation or its actual transportation by the carrier. Actual transportation, however, would not seem to be necessary to constitute this offense.[52] It may be prosecuted only in the district where the transportation at reduced rates is fraudulently obtained.[52]

A case is not made out under this provision against a shipper by showing simply that the carrier charged the shipper the tariff rate and then paid him a rebate. Some fraudulent device on the part of the shipper is essential.[53]

A shipper of an express package may not lawfully declare a low valuation on his goods in order to secure a low rate, even

(51) See supra §§125,157.
Also U. S. v. Clark, 164 Fed. 75, (**714**).
U. S. v. Wells Fargo Exp. Co., 161 Fed. 606, 610-611, (**636**).

(52) Re Belknap, 96 Fed. 614, (**282**).
Re Ault (unreported, see 13 Ann. Rep. 73-74).
Davis v. U. S., 104 Fed. 136; 43 C. C. A. 448, (**282**).
Armour v. U. S., 153 Fed. 1; 82 C. C. A. 135, (**476**-A); 209 U. S. 56, 75; 28 Sup. Ct. 428; 52 L. Ed. 428, (**476**-B).

(53) U. S. v. Hanley, 71 Fed. 672, 677, (**202**).
See also Atchison, T. & S. F. R. Co. v. Goetz Co., 51 Ill. App. 151, (1893).
And cf. Davies v. Pere M. R. Co., 10 I. C. C. Rep. 405, (**361**).

though he thus assents to limited liability on the part of the carrier.[54]

354. Conspiracies to Violate the Act.

Since the giving or receiving of rebates or other concessions necessarily involves the co-operation of the carrier or its officers with the shipper, they are not guilty of a conspiracy to violate a law of the United States[55] where the only participants in the transaction are the sole necessary actors therein.[56] Where, however, the violation of the Act is brought about by means of the co-operation of other outside parties, all may be guilty of such a conspiracy.[57]

355. May Offenses Under the Act be Prosecuted by Information?

Under the Act as it stood between 1903 and 1906, it was held that offenses might be prosecuted by information, as they were not "infamous" within the meaning of the Fifth Amendment.[58]

The Hepburn Amendment, however, replaced the imprisonment provision which had been stricken out by the Elkins Act. The reasoning of the opinion above cited would seem to point to the conclusion that offenses now punishable by imprisonment in the penitentiary may not be prosecuted by information.

356. Necessary Allegations in Indictments for Various Offenses.

An indictment or information for receiving rebates, whereby property is transported at less than tariff rates, need not specifically allege the actual payment of the unlawful rate, transportation at such rate being *prima facie* a completion of the offense,[59] but

(54) Admin. Rul. No. 53, (April 7th, 1908).

(55) Rev. Stat. Ch. 5440.

(56) U. S. v. New York Cent. R. Co., 146 Fed. 298, (**429**).

(57) Thomas v. U. S., 156 Fed. 897, (**538**).
U. S. v. Clark, 164 Fed. 75, (**714**).
See also Toledo A. A. & N. M. R. Co. v. Penna. Co., 54 Fed. 730; 19 L. R. A. 387, (1893).
U. S. v. Howell, 56 Fed. 21, (1892).
And compare Waterhouse v. Comer, 55 Fed. 149; 19 L. R. A. 403, (1893).

(58) U. S. v. Camden Iron Works, 150 Fed. 214, 215-6, (**449**-A).

(59) U. S. v. Vacuum Oil Co., 158 Fed. 536, 538, (**572**).
See, however, U. S. v. Great Nor. R. Co., 157 Fed. 288, (**490**).

actual transportation would seem necessary to the commission of this offense[60] although perhaps not to that of obtaining "any other advantage," etc., by means of concessions in rates.[61]

In indictments for giving or receiving less than published rates it is not necessary to allege that another shipper was given or received the higher rate filed,[62] although an allegation of this kind is necessary where the offense alleged is discrimination;[63] nor need it be alleged that the rebates were given or received in pursuance of a prior agreement.[64]

Every condition which might render the alleged acts legal need not be negatived in the indictment, this being properly a matter for the defense.[65] Where a discrimination is alleged to have been effected by means of a "device" the facts must be set out, a general allegation of an "illegal device" not being sufficient.[66] In cases involving a joint through shipment in connection with a water line, it has been held that it is not necessary to allege that the transportation was conducted "under a common control, management or arrangement" if this fact appears in the evidence.[67]

In prosecutions for violation of Section 3 of the Act "substantial similarity of circumstances and conditions" need not be specifically alleged, but in cases under Section 2 this would perhaps

(60) Re Huntington, 68 Fed. 881, (1895).
See supra §345.

(61) Supra §345.

(62) U. S. v. New York Cen. R. Co., 146 Fed. 298, (429).
U. S. v. Vacuum Oil Co., 153 Fed. 598, 604, (468).

(63) Supra, §124.

(64) U. S. v. Chicago, St. P., M. & O. R. Co., 151 Fed. 84, 85, (450-A).

(65) U. S. v. Chicago, St. P., M. & O. R. Co., 151 Fed. 84, 86, (450-A).

(66) Parsons v. Chicago & N. W. R. Co., 63 Fed. 903, 907-8;; 11 C. C. A. 489; 27 U. S. App. Rep. 394, (188-A); 167 U. S. 447; 42 L. Ed. 232; 17 Sup. Ct. 887, (188-B).

(67) U. S. v. Camden Iron Works, 150 Fed. 214, (449-A); judgment reversed, 158 Fed. 561, (449-B), but not on this point.
Cf., however, U. S. v. Penna. R. Co., 153 Fed. 625, (470), holding that the burden of proving a common arrangement is on the Government.

seem necessary.[68] Where the offense alleged is discrimination between individuals, and the particulars with reference to the shipments to the favored shipper are set out, with an allegation that for such shipments a less sum was received than from another shipper named, "for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," this is sufficient without giving the particulars of the service rendered to the prejudiced party.[69]

An indictment against a railroad official need not allege that the particular acts complained of were expressly authorized or directed by him, it being sufficient to state that he was the general agent of the carrier in charge of its office at the point of shipment.[70]

In indictments for discrimination in distribution of cars for coal, the proper share of the complaining mine must be stated, together with the number of cars actually allowed it.[71]

Where the offense relied on is the refusal of a switch connection similar to that allowed other mine owners, the indictment must allege that the switch refused was reasonable and practicable to put in, would furnish the carrier sufficient traffic to pay for its maintenance and that the party desiring it offered to pay the customary part of the expense of its construction.[72]

357. Hepburn Act not Retroactive but Repealing Clause did not Operate to Pardon Unindicted Offenses Committed Prior to its Passage.

The provisions of the Hepburn Act are not retroactive.[73] The

(68) U. S. v. Tozer, 37 Fed. 635; 2 L. R. A. 444n, (**70**-A).

(69) U. S. v. DeCoursey, 82 Fed. 302, (**234**).
See also Kinnavey v. Terminal Ass'n., 81 Fed. 802, 804-5, (**226**).

(70) U. S. v. Tozer, 37 Fed. 635; 2 L. R. A. 444n, (**70**-A).

(71) U. S. v. Baltimore & O. R. Co., 153 Fed. 997, 1007, (**475**).

(72) U. S. v. Baltimore & O. R. Co., 153 Fed. 997, 1006, (**475**).
In this case *semble* that perhaps a carrier is not indictable for refusing a switch, (p. 1005).

(73) U. S. v. New York Cent. & H. R. R. Co., 146 Fed. 298, 305, (**429**).

word "knowingly," inserted by it in the Elkins Act, does not apply to offenses committed prior to June 29, 1906.[74]

The repealing section of the Hepburn Act did not operate to pardon offenses committed prior to June 29, 1906, but not theretofore indicted.[75] In one case it was intimated, however, that offenses not "knowingly" committed prior to June 29th, 1906, and not indicted prior thereto could not be prosecuted thereafter.[76] In another case the Court said that the word "causes" in the repealing section refers to civil causes only and not to criminal cases.[77]

358. Effect of Joint Resolution of June 30th, 1906.

It has been doubted whether or not the joint resolution of June 30th, 1906, could prevent the Hepburn Act from having become effective when the President signed it on June 29th; this resolution would operate, however, as a suspension of the law from June 30th until August 29th, 1906.[78]

359. Limitation of Actions.

Section 1044 of the Revised Statutes applies to prosecutions for giving or receiving rebates, limiting the time within which the proceedings must be instituted to three years.[79]

(74) U. S. v. Delaware, L. & W. R. Co., 152 Fed. 269, 274-276, (**452**).

(75) U. S. v. Standard Oil Co., 148 Fed. 719, (**447**).
U. S. v. Chicago, St. P., M. & O. R. Co., 151 Fed. 84, (**450**-A).
U. S. v. Delaware, L. & W. R. Co., 152 Fed. 269, (**452**).
U. S. v. New York Cent. & H. R. R. Co., 153 Fed. 630, (**471**).
Great Nor. R. Co. v. U. S., 155 Fed. 945, (1907).
U. S. v. Great Nor. R. Co., 157 Fed. 288, (**490**).
Cf. U. S. v. Michigan Cent. R. Co., 122 Fed. 544, (**316**).

(76) Great Nor. R. Co., v. U. S., 155 Fed. 945, 957-958, (1907).

(77) U. S. v. Chicago, St. P., M. & O. R. Co., 151 Fed. 84, 100, (**450**-A).

(78) U. S. v. Standard Oil Co., 148 Fed. 719, 722, (**447**).
But see Goff-Kirby Co. v. Bessemer & L. E. R. Co., 13 I. C. C. Rep. 383, 386, (**623**).
See also supra, §325.

(79) U. S. v. Central Vt. R. Co., 157 Fed. 291, (**564**).
See also Par. 3 of the Elkins Act as to limitation in proceedings for forfeitures by shippers of treble the amount of the rebates received.
As to Limitation of Actions in civil cases, see supra, §§325, 340.

APPENDIX A.

Rules of Practice Before the Commission in Proceedings Under the Act to Regulate Commerce.

I.

PUBLIC SESSIONS.

The general sessions of the Commission for hearing contested cases, including oral argument, will be held at its office in the American Bank Building, No. 1317 F street N. W., Washington, D. C., and the two weeks beginning with the first Monday in each month are set aside for that purpose.

Special sessions may be held at other places as ordered by the Commission.

II.

PARTIES TO CASES.

Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or any common carrier, or the railroad commissioner or commission of any State or Territory, may complain to the Commission by petition, of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier or carriers or other parties subject to the provisions of said Act. Where a complaint relates to the rates, regulations, or practices of a single carrier, no other carrier need be made a party, but if it relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are proper parties defendant.

When a complaint relates to rates, regulations, or practices of carriers operating different lines, and the object of the proceeding

is to secure correction of such rates, regulations, or practices on each of said lines, all the carriers operating such lines must be made defendants.

When the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such line.

Persons or carriers not parties may petition in any proceeding for leave to intervene and be heard therein. Such petition shall set forth the petitioner's interest in the proceeding. Leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding, but no person not a carrier who intervenes in behalf of the defense shall have the right to file an answer or otherwise become a party, except to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard, in person or by counsel, on the argument of the case.

III.

COMPLAINTS.

Complaints must be by petition setting forth briefly the facts claimed to constitute a violation of the law. The name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any, must appear upon the petition. The petition need not be verified. The complainant must furnish as many copies of the petition as there may be parties complained against to be served and three additional copies for the use of the Commission.

The Commission will cause a copy of the petition, with notice to satisfy or answer the same within a specified time, to be served personally or by mail, in its discretion, upon each defendant.

IV.

ANSWERS.

A defendant must answer within twenty days from the date of the notice above provided for, but the Commission may, in a par-

ticular case, require the answer to be filed within a shorter time. The time prescribed in any case may be extended, upon good cause shown, by the Commission. The original answer must be filed with the secretary of the Commission at its office in Washington, and a copy thereof at the same time served by the defendant, personally or by mail, upon the complainant, who must forthwith notify the secretary of its receipt. The answer must specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial. If a defendant shall make satisfaction before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant, and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written acknowledgment must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the defendant.

V.

NOTICE IN NATURE OF DEMURRER.

A defendant who deems the petition insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted. A copy of the notice must at the same time be filed with the secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing.

VI.

SERVICE OF PAPERS.

Copies of notices or other papers must be served upon the adverse party or parties, personally or by mail, and when any party has appeared by attorney service upon such attorney shall be deemed proper service upon the party.

VII.

AMENDMENTS.

Upon application of any party, amendments to any petition or answer, in any proceeding or investigation, may be allowed by the Commission, in its discretion.

VIII.

ADJOURNMENTS AND EXTENSIONS OF TIME.

Adjournments and extensions of time may be granted upon the application of any party, in the discretion of the Commission.

IX.

STIPULATIONS.

The parties to any proceeding or investigation before the Commission may, by stipulation in writing filed with the secretary, agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

X.

HEARINGS.

Upon issue being joined by the service of an answer or notice of hearing on the petition, the Commission will assign a time and place for hearing the case, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless their testimony be taken or the facts be agreed upon as provided for in these rules. The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the defendant admits the same or fails to answer the petition. The defendant must also prove facts alleged in the answer, unless admitted by the petitioner, and fully disclose its defense at the hearing.

In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.

Cases may be heard by one or more members of the Commission, or by a special agent or examiner, as ordered by the Commission. When testimony is directed to be taken by a special agent or examiner, such officer shall have power to administer oaths, examine witnesses, and receive evidence, and shall make report thereof to the Commission.

All cases shall be orally argued in Washington, D. C., or submitted upon briefs, unless otherwise ordered by the Commission.

XI.

DEPOSITIONS.

The testimony of any witness may be taken by deposition, at the instance of a party, in any case before the Commission, and at any time after the same is at issue. The Commission may also order testimony to be taken by deposition, in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any authorized special agent or examiner of the Commission, judge of any court of the United States, or any commissioner of a circuit or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties or otherwise interested in the proceeding or investigation. Reasonable notice must be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition, and a copy of such notice shall be filed with the secretary of the Commission.

When testimony is to be taken on behalf of a common carrier in any proceeding instituted by the Commission on its own motion, reasonable notice thereof in writing must be given by such carrier to the secretary of the Commission.

Every person whose deposition is taken shall be cautioned and sworn (or may affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing, which may be typewriting, by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the witness.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the secretary. All depositions must be promptly filed with the secretary.

XII.

WITNESSES AND SUBPOENAS.

Subpœnas requiring the attendance of witnesses from any place in the United States to any designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the Commission, or an authorized special agent or examiner of the Commission, or by deposition, will, upon the application of either party, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission.

Subpœnas for the production of books, papers, or documents (unless directed to issue by the Commission upon its own motion) will only be issued upon application in writing; and when it is sought to compel witnesses, not parties to the proceeding, to produce such documentary evidence, the application must be sworn to and must specify, as nearly as may be, the books, papers, or documents desired; that the same are in the possession of the witness or under his control; and also, by facts stated, show that they contain material evidence necessary to the applicant. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.

Witnesses whose testimony is taken orally or by deposition, and the magistrate or other officer taking such depositions, are severally entitled to the same fees as are paid for like services in the

courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.*

XIII.

DOCUMENTARY EVIDENCE.

Where relevant and material matter offered in evidence is embraced in a report, tariff, rate sheet, classification, book, pamphlet, written or printed statement, or document of any kind containing other matter not material or relevant and not intended to be put in evidence, such report, etc., in whole, shall not be received or allowed to be filed in a cause on hearing before this Commission or at any time during the pendency thereof, but counsel or other party offering the same shall also present in convenient and proper form for filing a copy of such material and relevant matter, and that only shall be received and allowed to be filed as evidence and made part of the record in such cause; provided, however, that if practicable, such matter may be read and taken down by the reporter and thus made part of the record.

XIV.

BRIEFS.

Unless otherwise specially ordered, printed briefs shall be filed on behalf of the parties in each case. The brief for complainant and the brief or briefs for the defense shall contain an abstract of the evidence relied upon by the party filing the same, and in such abstract reference shall be made to the pages of the record wherein the evidence appears. The abstract of evidence shall follow the statement of the case and precede the argument. Briefs shall be filed with the Commission and served upon the adverse party or parties by the complainant within fifteen days after the taking of testimony has been concluded, by the defendant or defendants within ten days thereafter, and the complainant shall have five days' additional time for reply. A shorter time or different appor-

*Fees of witnesses are fixed by law at $1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom.

tionment not involving greater time may be specially ordered in any case.

Briefs shall be printed in twelve point type, on antique finish paper, 5⅞ inches wide by 9 inches long, with suitable margins, double-leaded text and single-leaded citations.

When the case is assigned for oral argument all briefs shall be filed and served at least five days before such argument. All briefs shall be filed with the secretary and shall be accompanied by notice showing service upon the adverse party. Fifteen copies of each brief shall be filed for the use of the Commission.

All parties will be required to comply strictly with this rule, and except for good cause shown no extension will be allowed.

XV.

REHEARINGS.

Applications for reopening a case after final submission, or for rehearing after decision made by the Commission, must be by petition, and must state specifically the grounds upon which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a rehearing, the petition must specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error; and when any decision, order, or requirement of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such decision, order, or requirement which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth.

XVI.

PRINTING OF PLEADINGS, ETC.

Pleadings, depositions, and other papers of importance shall be printed or in typewriting, and when not printed only one side of the paper shall be used.

XVII.

COPIES OF PAPERS OR TESTIMONY.

Copies of any report, decision, order, or requirement of the Commission will be furnished without charge upon application to the secretary by any person or carrier party to the proceeding.

One copy of the testimony will be furnished by the Commission for the use of the complainant and one copy for the use of the defendant, without charge; and when two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

XVIII.

COMPLIANCE WITH ORDERS.

Upon the issuance of an order against any defendant or defendants, after hearing, investigation, and report by the Commission, such defendant or defendants must promptly notify the secretary of the Commission, upon the date when such order becomes effective, as to whether such defendant or defendants has complied or not with the provisions of said order; and when a change in rates is required, such notice must be given in addition to the filing of a schedule or tariff showing such change in rates.

XIX.

APPLICATIONS BY CARRIERS UNDER PROVISO CLAUSE OF FOURTH SECTION.

Any common carrier may apply to the Commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance. Such application shall be by petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the petitioner which may be interested in the traffic, the character of the hardship claimed to ex-

ist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the Commission will take such action as the circumstances of the case seem to require.

XX.

INFORMATION OF PARTIES.

The secretary of the Commission will, upon request, advise any party as to the form of petition, answer, or other paper necessary to be filed in any case, and furnish such information from the files of the Commission as will conduce to a proper presentation of facts material to the controversy.

XXI.

ADDRESS OF THE COMMISSION.

All complaints concerning anything done or omitted to be done by any common carrier, and all petitions or answers in any proceeding, or applications in relation thereto, and all letters and telegrams for the Commission, must be addressed to Washington, D. C., unless otherwise specially directed.

FORMS.

These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.

No. 1.

Complaint Against a Single Carrier.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ———— RAILROAD COMPANY

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of ———— and points in the State of ————, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That (*here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as Nos. I. II, and III*).

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such other and further order as the Commission may deem necessary in the premises. (*The prayer may be varied so as to ask also for the ascertainment of lawful rates or practices and an order requiring the carrier to conform thereto. If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper*).

Dated at ———, ————, 190—.

A. B.
(*Complainant's signature*).

No. 2.

Complaint Against Two or More Carriers.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ———— RAILROAD COMPANY.
AND
THE ———— RAILROAD COMPANY.

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendants above named are common carriers engaged in

the transportation of passengers and property by continuous carriage or shipment, wholly by railroad (*or partly by railroad and partly by water, as the case may be*), between points in the State of ———— and points in the State of ————, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

(*Then proceed as in Form* 1).

No. 3.

Answer.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ———— RAILROAD COMPANY.

The above-named defendant, for answer to the complaint in this proceeding, respectfully states—

I. That (*here follow the usual admissions, denials, and averments. Continue numbering each succeeding paragraph*).

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE ———— RAILROAD COMPANY,
By E. F.
(*Title of officer*).

No. 4.

Notice by Carrier Under Rule V.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ———— RAILROAD COMPANY.

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE ———— RAILROAD COMPANY,
By E. F.
(*Title of officer*).

No. 5.

Subpoena.

To ———— ————,
———— ————.

You are hereby required to appear before ———— in the matter of a complaint of ———— against ————, as witness on the part of

————, on the ———— day of ————, 190—, at ———— o'clock —. m. at ————, and bring with you then and there ————.

————— ————,
Commissioner.

Dated.
(Seal)
————— ————,
————— ————.
Attorney for ————.

(NOTICE.—Witness fees for attendance under this subpœna are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice).

No. 6.

Notice of Taking Depositions Under Rule XII.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ———— RAILROAD COMPANY.

You are hereby notified that G. H. will be examined before C. D., a ———— (*title of officer or magistrate*), at ————, on the ——— day of ————, 190—, at ———o'clock in the ————noon, as a witness for the above-named complainant (*or defendant, as the case may be*), according to act of Congress in such case made and provided, and the Rules of Practice of the Interstate Commerce Commission, at which time and place you are notified to be present and take part in the examination of the said witness.

Dated ————— ————, 190—.

I. J.
(*Signature of complainant or defendant, or of counsel*).

To A. B., the above-named complainant (or *The ———— Railroad Company, the above-named defendant; or to K. L., counsel for the above-named complainant or defendant*).

APPENDIX B.

ANNOTATIONS TO COMMISSION CITATIONS.

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